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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 958.

THE STATE OF CONNECTICUT AT THE RELATION OF THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY AND DAVID S. PLUME, PLAINTIFF IN ERROR,

vs.

GEORGE M. WOODRUFF ET AL., COMMISSIONERS OF THE ASYLUM-STREET BRIDGE COMMISSION.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

FILED JULY 1, 1893.

(15,342.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 21, 1894.

1 UNITED STATES OF AMERICA, } ss:
State of Connecticut, Hartford, }

The President of the United States of America to the honorable the judges of the supreme court of errors of the State of Connecticut, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of errors of the State of Connecticut before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between the State of Connecticut (acting therein by Tilton E. Doolittle, attorney to the said State for the county of New Haven) at the relation of the New York and New England Railroad Company, a corporation incorporated by the State of Connecticut, and David S. Plume, of the town of Waterbury, in the county of New Haven, in said State, plaintiffs, and George M. Woodruff, of the town of Litchfield, in the county of Litchfield, in said State; William H. Hayward, of the town of Colchester, in the county of New London, in said State; William O. Seymour, of the town of Ridgefield, in the county of Fairfield, in said State; Morgan G. Bulkeley, of the town of Hartford, in the county of Hartford, in said State, and Nathaniel Wheeler, of the town of Bridgeport, in the county of Fairfield, in said State, commis-
2 sioners under an act of the General Assembly of the State of Connecticut approved April 4th, 1884, and sundry acts amendatory thereof, and commonly known as the Asylum Street Bridge Commission, defendants, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, or exemption specially set up or denied under such clause of the Constitution, a manifest error hath happened to the great damage of the said plaintiffs in said suit, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fifth day of July, 1893, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.
3 Witness the Honorable Melville W. Fuller, Chief Justice

of the said Supreme Court the sixth day of June, in the year of our Lord one thousand eight hundred and ninety-three.

[Seal of Circuit Court, Connecticut.]

E. E. MARVIN,
Clerk Circuit Court.

Approved by—
CHARLES B. ANDREWS,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

Filed June 6th, 1893.

ANKETELL,
Clerk of the Supreme Court of Errors in and for New Haven County, in the Third Judicial District, State of Connecticut.

THE STATE OF CONNECTICUT at the Relation of the New York and New England Railroad Company and David S. Plume, of the Town of Waterbury, State of Connecticut,

vs.

GEORGE M. WOODRUFF, of Litchfield; WILLIAM H. HAYWARD, of Colchester; William O. Seymour, of Ridgefield; Morgan G. Bulkeley, of Hartford, and Nathaniel Wheeler, of Bridgeport, in the State of Connecticut, Constituting and Known as the Asylum Street Bridge Commission.

Know all men by these presents that we, Tilton E. Doolittle, of the town and county of New Haven, State of Connecticut, as principal, and William L. Bennett, of said New Haven, as surety, are holden and firmly bound, jointly and severally, unto George M. Woodruff, of the town of Litchfield, in said State; William H. Hayward, of the town of Colchester, in said State; William O. Seymour, of the town of Ridgefield, in said State; Morgan G. Bulkeley, of the town of Hartford, in said State, and Nathaniel Wheeler, of the town of Bridgeport, in said State, commissioners under an act of the
5 General Assembly of the State of Connecticut approved April 4th, 1884, and sundry acts amendatory thereof, and commonly known as the Asylum-street bridge commission, in the sum of two hundred and fifty dollars ($250), to be paid to them; to the which payment, well and truly to be made and done, we, the said obligors, do bind ourselves and each of us, our heirs, executors, and administrators, and each and every of them, for and in the whole firmly by these presents.

Signed with our hands and sealed with our seals, at New Haven, this sixth day of June, A. D. 1893.

The condition of this obligation is such that, whereas the State of Connecticut, acting therein by the said Tilton E. Doolittle, attorney to the said State of Connecticut for the county of New Haven, at the relation of the New York and New England Railroad Company, a corporation incorporated by the State of Connecticut, and David S.

Plume, of the town of Waterbury, in said State, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of errors of the State of Connecticut:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs in error shall prosecute said writ of error to effect and answer all costs and damages if they shall fail to make their plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

TILTON E. DOOLITTLE. [SEAL.]
WILLIAM L. BENNETT. [L. S.]

6 Sealed and delivered, taken and acknowledged, this sixth day of June, 1893, before me.

[Seal William A. Wright, U. S. Commissioner, Dist. of Conn.]

WILLIAM A. WRIGHT,
United States Commissioner.

Approved by—
CHARLES B. ANDREWS,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

Filed June 6th, 1893.

EDWARD A. ANKETELL,
Clerk of the Supreme Court of Errors in and for New Haven County, in the Third Judicial District, State of Connecticut.

7 UNITED STATES OF AMERICA, } ss:
State of Connecticut, New Haven, }

To George M. Woodruff, of the town of Litchfield, in the county of Litchfield, State of Connecticut; William H. Hayward, of the town of Colchester, in the county of New London, in said State; William O. Seymour, of the town of Ridgefield, in the county of Fairfield, in said State; Morgan G. Bulkeley, of the town of Hartford, in the county of Hartford, in said State; and Nathaniel Wheeler, of the town of Bridgeport, in the county of Fairfield, in said State, commissioners under an act of the General Assembly of the State of Connecticut, commonly known as the Asylum-street bridge commission, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of errors of the State of Connecticut for the third judicial district, wherein The State of Connecticut, The New York and New England Railroad Company, and David S. Plume are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ mentioned, should
8 not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles B. Andrews, chief justice of the supreme court of errors of the State of Connecticut, this sixth day of June, in the year of our Lord one thousand eight hundred and ninety-three.

CHARLES B. ANDREWS,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

9 UNITED STATES OF AMERICA, *District of Connecticut*, } *ss:*

BRIDGEPORT, *June 10th*, 1893.

Then and there I served the foregoing writ upon the within-named defendant, Nathaniel Wheeler, of the town of Bridgeport, by leaving a true and attested copy at his residence in the hands of Mary C. Wheeler, his wife.

On the same day and date I served the foregoing writ upon the within-named defendant, Morgan G. Bulkley, of the town of Hartford, by leaving a true and attested copy in his hands.

On June 16th, 1893, I served the within writ upon each of the within-named defendants (viz.), George M. Woodruff, of the town of Litchfield; William H. Hayward, of the town of Colchester, and William O. Seymour, of the town of Ridgefield, by leaving a true and attested copy in the hands of each of said defendants.

On June 17th, 1893, I served the foregoing writ upon Henry C. Robinson, attorney of record for the Asylum-street bridge commission by leaving a true and attested copy in his hands.

Attest: EMORY F. STRONG,
U. S. Marshal,
By REMUS C. LOVERIDGE,
His Deputy.

Fees.

6 services	$12 00
Travel	21 00
6 copies	3 00
6 endorsements	90
	$36 90

10 *Plaintiffs' Appeal.*

Supreme Court of Errors, New Haven County.

Third Judicial District, Third Tuesday in January, 1893.

THE STATE OF CONNECTICUT *ex Rel.* THE NEW YORK & NEW ENGLAND R. R. Co.
vs.
THE ASYLUM STREET BRIDGE COMMISSION.
} Superior Court, New Haven County, the 24th day of June, A. D. 1892.

Motion for writ of mandamus.

To the honorable superior court now in session in New Haven, in and for the county of New Haven, comes Tilton E. Doolittle,

State's attorney for said county, at the relation of the New York & New England Railroad Company, and David S. Plume, of the town of Waterbury, New Haven county, a stockholder of said company, and shows to said court that—

1. The New York & New England Railroad Company is a corporation incorporated in the State of Connecticut, and on and for many years prior to the 4th day of April, 1884, owned and operated a railroad running through the town of Hartford to and through Waterbury, in New Haven county, and Danbury, in Fairfield county, and extending westward to the Hudson river and eastward to the cities of Boston and Providence,

2. Said company was the owner on said day of a stone depot building in said city of Hartford, situated between Asylum street and Church street in said city, and a convenient freight yard adjacent and contiguous thereto, and the tracks of said railroad crossed Asylum street and Church street at grade and said freight yard was on both sides of Church street.

3. Said depot building and the grounds adjacent thereto, above described, and sundry buildings upon the same for freight
11 stations, round-houses, and railroad shops were all in use at said date for the purposes of said railroad, and, in order to use the same most conveniently, it was necessary that there should be an uninterrupted use of said tracks of said railroad company from the south side of Asylum street to and beyond the north side of Church street, a large part of the freight yard and outbuildings of said company above described being situated north of Church street.

4. On said day an act was passed by the General Assembly of this State, entitled "providing for bridge at railroad crossing at Asylum street, Hartford," and amendments to said act were subsequently passed by said assembly on March 3d, 1885, March 26th, 1885, and February 19th, 1886.

5. By and under said several acts a commission was created, known as the Asylum-street bridge commission, consisting of George M. Woodruff, of Litchfield, William H. Hayward, of Colchester, and William O. Seymour, of Ridgefield, railroad commissioners of said State, and Morgan G. Bulkeley, of Hartford, and Nathaniel Wheeler, of Bridgeport. And said commission was thereafter duly organized, and appointed said Woodruff as chairman, and George T. Utley, clerk of the railroad commissioners, as its clerk, to keep a record of its proceedings.

6. Said acts gave said commission power to decide what changes should be made in the manner in which, and the place where, in the then line of Asylum street the tracks of said railroad company, and also the tracks of the New York, New Haven & Hartford Railroad Company, which were also upon said street at grade, should thereafter cross said street, in order to abolish said grade-crossing of said street by said tracks; and power also to determine by whom and within what time said change should be made; and to order the carrying of said tracks and the structure therefor over said Asylum street, and direct such a change in the grade of said street

in its then line of direction as they should judge necessary and proper, to the end aforesaid; and to order said railroad companies, or either of them, or the receiver or other person or persons operating either of said railroads, to lay out, construct, and maintain a new line or lines of railroad for a distance not exceeding one-half a mile on each side of said Asylum street, and within three hundred feet of the center line of the present tracks of said railroads; and to require any or all of the present tracks within said limits to be taken up and removed; and to make any and all orders relating to said improvement and to all matters and things
12 appertaining thereto, which they might deem necessary and proper, in the same manner and to the same extent as the General Assembly might do and direct. And power was further thereby given to said commission to direct by whom, when and how the work should be performed, and who should pay for the same, and what proportion of the entire expense, including land damages, each party should pay and bear, and, in the event of any disagreements between the parties interested, to determine the cost of the whole or any portion of the work, and to make any and all orders as to the manner and amounts of payments which they might judge reasonable, provided only that they should not require the city of Hartford to pay any portion of the cost of any changes in the then existing depot near Asylum street, or of the construction of any new depot, nor to pay exceeding one-half of all the other expenses, including land damages, to be incurred under said acts.

7. On March 11th, 1887, said commission, acting under said several acts of the General Assembly, voted "that the New York, New Haven & Hartford Railroad Company and the New York & New England Railroad Company are hereby ordered to carry their tracks over Asylum street, leaving a clear space between said structure and said street of not less than 16 feet, in general accordance with the plan and drawings submitted to this commission February 4th, 1887, marked 'proposed station at Hartford, Conn., February 15, 1887;' and for this purpose the city of Hartford is hereby directed to lower the grade of said street under said tracks two feet; and, in case of disagreement between said parties, details of construction to be hereafter determined by this commission: the entire work to be completed on or before the 1st day of December, 1887."

8. In order to conform to the requirement of said vote it was necessary that the New York & New England Railroad Company should demolish and remove its said stone depot building between Asylum and Church streets, as said elevated tracks would necessarily occupy the space previously covered by said building.

9. The height at which said vote required the tracks of said company to be carried over Asylum street, conformably to said plan, also required said tracks to be kept at a considerable elevation for a long distance above the former grade of said company's railroad then existing, and to occupy a considerable portion of said company's station ground and freight yard with foundations for said

tracks, whereby said company was necessarily deprived of
13 the use of said parts of its ground, except as the same might serve to support said tracks.

10. Said company went forward and conformed to the requirement of said vote, and on December 20th 1888 the elevation of said tracks as so ordered was nearly completed.

11. On said day said commission voted that the completion of said improvement pursuant to said vote, the carrying out of the design and instructions of the legislative acts creating and regulating the board of commission, and public convenience and necessity all required, and the commission deemed it necessary and proper to order and direct, and did accordingly order and direct that said New York & New England Railroad Company and the New York, New Haven & Hartford Railroad Company severally take up and remove their surface tracks between the line of the face of the abutment on the south side of Asylum street and the line of the face of the abutment as now located and established on the north line of Church street, within thirty days after the new depot at said Asylum street, contemplated by said plan referred to in said previous vote, should be occupied and used by said companies, respectively.

12. Said New York & New England Railroad Company removed their said surface tracks upon Asylum street, but did not remove the residue of said tracks between Asylum street and the north line of Church street, within said period of thirty days, as required.

13. Thereupon, on September 11th, 1889, said Woodruff, Bulkeley, Hayward, Seymour and Wheeler, as such board of commissioners, commonly known as the Asylum-street bridge commission, appeared before the superior court in session at Hartford, and showed that said period of thirty days had elapsed, and yet that said New York & New England Railroad Company had not removed said surface tracks between the north side of said Asylum street and the north side of Church street, and moved for the issue of a writ of mandamus requiring said company to remove said tracks in obedience to said order; whereupon on said day an alternative writ of mandamus, directed to said company, was issued by said court, agreeably to said motion.

14. Said company was required by said alternative writ to obey the precept thereof, or signify cause to the contrary to said court on the first Tuesday of October, 1889; and on the first day of October, 1889 said company filed its petition in said court for the removal of said cause into the circuit court of the United States
14 for the district of Connecticut, and also filed its bond for the sum of $1,000, with sufficient surety, conditioned as by act of Congress required, for the payment of all costs, should it be held by said circuit court that such suit was improperly or wrongfully removed thereto.

15. Said petition was thereupon duly brought to the notice of said superior court, but said court denied the same and retained cognizance of said cause, and such proceedings were there-

after had thereon that a peremptory writ of mandamus was issued, as prayed for by said motion.

16. An appeal was thereupon taken from said judgment of the superior court by said company to the supreme court of errors next to be held in said county, and sundry errors were assigned, among others, the denying of said petition for the removal of said cause, and the retention of jurisdiction over the same by said superior court, and that it was held that said commission had power to make the order in question, and to invoke the aid of the court to compel obedience thereto.

17. Afterwards, on May 5th, 1890, said supreme court of errors adjudged that there was no error in the judgment of the superior court; and thereupon, on May 12th, 1890, a writ of error was prayed out by said company and allowed from the Supreme Court of the United States to the supreme court of errors, and a proper citation signed and supersedeas bond approved by the Honorable Samuel Blatchford, a justice of the Supreme Court of the United States, who indorsed said bond over his signature as follows: "The foregoing bond is taken out and approved to operate as a supersedeas and stay of execution."

18. On May 13th, 1890, said writ of error was duly served by being lodged in the office of the clerk of the supreme court of errors, and a copy thereof was also on said day lodged in said office for each of the members of said commission; and said supersedeas bond was also then lodged in said office; and on May 13th and 14th said citation to said several commissioners was duly served on each of them by the marshal of the United States; and on May 22d, 1890, the clerk of the supreme court of errors made due return of said writ of error; and thereupon said writ of error with said return was duly filed in the office of the clerk of the Supreme Court of the United States on May 27th, 1890, and said writ of error was docketed as No. 1180 on the docket of said court.

15 19. On said same day, May 27th, 1890, said members of the Asylum-street bridge commission applied to the superior court for Hartford county by motion for an attachment against all the directors of the New York & New England Railroad Company, and that they be committed to jail in Hartford county for contempt and disobedience of the peremptory writ of mandamus in said original cause, which had been issued by said superior court on May 7th, 1890, and a rule to show cause against said company and its said directors was on said day issued by said superior court; whereupon said company claiming that said issue of said writ of peremptory mandamus was contrary to law by reason of their said appellate proceedings, or that, if properly issued, said supersedeas bond had superseded the same, brought its bill in equity before the circuit court of the United States for the district of Connecticut against the members of said Asylum-street bridge commission, setting up said claims and said proceedings for contempt in the superior court initiated May 27th, 1890, and praying for a provisional injunction out of said circuit court to prevent any attachment of the bodies of the directors of said company; and process

on said bill of equity in said circuit court was duly served upon the members of said commission, and they appeared to respond to the same.

20. Said New York & New England Railroad Company further brought a petition to the justices of the Supreme Court of the United States against the members of said commission as such, setting forth the premises, and praying that an injunction might issue from the Supreme Court of the United States against said members of said commission as such, and enjoining them and each of them from proceeding further before said superior court under said rule to show cause, or in any other manner to enforce said peremptory writ of mandamus, until the final judgment of the Supreme Court of the United States on said writ of error.

21. The New York & New England Railroad Company further sued out a writ of error, and gave a supersedeas bond therewith, from the Supreme Court of the United States to said superior court, which bond was approved as a supersedeas, and said writ allowed, and due citation to said members of said commission as such, signed by Mr. Justice Blatchford of the Supreme Court of the United States, and said citation was duly served on said members of said commission as such commission, and said writ of error duly returned unto the Supreme Court of the United States, and said cause duly docketed on the docket of said court.

16 22. Shortly after the filing of said petition to remove said original cause from said superior court to said circuit court of the United States for the district of Connecticut, the New York & New England Railroad Company had procured duly certified copies of the proceedings in the superior court in said cause, including said petition and bond and the order of said court denying said petition, and filed the same in said circuit court of the United States, on the first day of its then next session, in due form of law, and claimed that said cause had been thereby effectually removed from said superior court to said circuit court.

23. On July 18th, 1890, pending said writs of error in the Supreme Court of the United States, the mayor and common council of the city of Hartford applied to the railroad commissioners of the State of Connecticut, which board was composed of said Woodruff, Hayward and Seymour, constituting a majority of the Asylum-street bridge commission, praying that said railroad commissioners would order the tracks of the New York & New England railroad across Church street to be taken up and removed, as constituting a nuisance, dangerous to life and inconvenient to the public; whereupon said commissioners, having given due notice to said company, met to hear the same on September 2d, 1890, when said company appeared and filed a petition for the removal of said proceedings into the circuit court of the United States then next to be held in the district of Connecticut, and at the same time filed a bond with sufficient surety, as required by act of Congress; and thereupon said petition was denied by said commissioners on the ground that said proceedings before them were not properly removable to the circuit court of the United States, and were not a suit pending in a State

court. And afterwards said company filed its answer to said application of said city of Hartford, therein setting up among other things that the Asylum-street bridge commission were in duty bound to order what party should pay the expense of removing said tracks across Church street and the damages thereby done to the New York & New England Railroad Company, and how much thereof should fall upon said city of Hartford; and that said company owned a freight yard adjoining said Church-street crossing, which would be rendered almost valueless by removing said tracks, because it could not be advantageously used for any practical purpose without switching over said tracks, and to remove said tracks would inflict upon said company a damage of $200,000; and
17 that said proceeding was an attempt of said city indirectly to accomplish the result designed by said order of said bridge commission made December 20th, 1888, notwithstanding said order was superseded by said writs of error, and was an attempt to avoid the payment of the damages for such removal of said tracks assessable under said acts of said General Assembly, and the damages consequent on said order; and said parties were fully heard before said railroad commissioners on said application and answer; and on October 2d, 1890, said commissioners found that public convenience required that the said tracks for side tracks or for switching purposes where the same crossed Church street should be removed, and thereupon ordered the said company within one month thereafter to remove said tracks then laid across said Church street; from which order of said railroad commissioners said company thereupon took an appeal to the superior court for Hartford county, which appeal was duly served and returned.

24. After said appeal, and pending said two writs of error to the supreme court of errors and the superior court, and said two proceedings in the circuit court of the United States, and also after the New York & New England Railroad Company had filed in the circuit court of the United States for the district of Connecticut certified copies of said proceedings before the railroad commissioners, had on said application of the city of Hartford, claiming said proceeding to have been duly removed to the then next circuit court, at which said copies were entered on the docket, a conference was held between the representatives of said Asylum-street bridge commission and of the New York & New England Railroad Company and of the city of Hartford with a view to an amicable settlement of all matters in controversy with reference to the removal of tracks between the north line of Church street and Asylum street, as ordered as aforesaid, and said conference resulted in a compromise and arrangement of settlement, which was reduced to writing and signed by the parties, and is as follows:

"*Memorandum of Terms of Settlement of all Controversies Relating to Tracks between the North Line of Church Street and Asylum Street.*

In the above-named controversy the following terms of settlement are agreed to by counsel for the bridge commission,

for the city of Hartford, and for the New York & New England Railroad Company, respectively:

1. The said tracks are to be taken up on or before December 1, 1890.

2. All proceedings in the Federal courts are to be withdrawn without cost to either party.

3. As soon as possible after the first Tuesday in December the city of Hartford and the New York & New England Railroad Company will unite in procuring from the superior court in the matter of the appeal of said railroad company from the order of the railroad commissioners concerning the tracks on Church street, a final order disaffirming the said order of the railroad commissioners.

4. Counsel for the bridge commission and for the city concede that it is competent for the Asylum-street bridge commission to award the New York & New England Railroad Company their actual damage for the removal of their tracks, as ordered by said commission, south of the north line of Church street, as part of the expense of the improvement.

Agreed to—

By the New York & New England Railroad Company, Charles A. Prince, general counsel;

By Henry C. Robinson, William F. Henney, of counsel for bridge commission and for city of Hartford."

25. Thereupon the New York & New England Railroad Company in conformity to said settlement removed its tracks across Church street, as agreed, and withdrew all proceedings in the circuit court and Supreme Court of the United States without costs to either party, and united with the city of Hartford as soon as possible after the first Tuesday in December, 1890, in procuring from the superior court an order disaffirming said order of the railroad commissioners. And thereupon said company presented to the Asylum-street bridge commission a claim for the damages for the removal of their tracks as ordered by said commission south of the north line of Church street, and for sundry other matters of damage to said company incident to the general elevation of its tracks, as aforesaid, over Asylum street, and the changes necessarily consequent thereon.

26. The following is a copy of said itemized claim of the New York & New England Railroad Company for damages in connection with the Asylum-street, Hartford, improvement, pre-

19 sented to the Asylum-street bridge commission after the execution by said company of said compromise agreement on its part:

1. Catlin land	$5,000 00
Purchased October 25, 1888, 2 years', 7 months', 14 days' interest	786 65
2. Land of the company taken to widen Asylum street, being a strip on the south side of Asylum street about 10 feet wide and of the width of the location	5,000 00

3. Land of the company taken for retaining wall running north from Church street about 890 feet, and amounting to about 6,900 square feet..... 15,600 00
4. Destruction of old station building on Spruce street, and loss of rentals received and receivable therefrom 45,000 00
5. Cost of resurfacing temporary tracks on each side of Asylum street 1,224 71
6. Cost of tools used up in doing work ordered by commission 98 50
7. Amount paid to administrator of John Connelly who lost his life while employed by the company on work ordered by the commission..... 150 00
8. Cost of extra switching freight and passenger trains due to the interruption of the tracks, in consequence of the work ordered by the commission..... 6,792 40
9. Cost, so far as at present ascertained, of the abutment on the south side of Asylum street in excess of amount allowed 1,580 54

N. B.—Suit is pending by John Beattie against the two railroad companies, which makes extra charges for work in this connection, which are disputed, and until that suit is determined the precise amount of expense of this work cannot be ascertained.

10. Salary of additional telegraph operators from June 1, 1887, to June 30, 1889..... 1,250 00
11. Cost of fitting up temporary office, made necessary by destruction of old station... $320 28
And rent of temporary office from October 1, 1887, to June 30, 1889..... 749 97
1,070 25
12. Cost of temporary station for use until elevated structure was completed..... 4,143 71
13. Additional cost of transporting baggage between the temporary stations of the two roads, on each side of elevated structure... 1,305 00
14. Cost of laying new sidewalk necessitated by the lowering of Asylum street, ordered by the commission 680 63

15. Land damage from order of the commissioners, for removal of track across Church street; loss of use for railroad purposes of property south of Church street; impairment of value of freight yard and shop property north of Church street:

A.

Loss of buildings north of Church street:

Round-houses	$20,400 00
Car shop	3,250 00
Turn-tables	4,500 00

Machine shop	15,850 00	
Blacksmith shop	5,000 00	
Ash-pit	500 00	
Office	500 00	
		50,000 00

B.

Cost of raising yard and relaying tracks north of Church street, to conform to elevated grade	5,169 57

C.

Difference between the value of the land between Church and Asylum streets for the purposes it can now be used for and its value for railroad purposes, as it could have been used prior to the removal of the tracks on Church street	200,000 00

D.

Impairment of value of yard north of Church street, consequent on changes incident to the work ordered by the commission and to the removal of the tracks across Church street	100,000 00

21

E.

Damage from interruption of use of territory between Asylum street and Walnut street from April, 1887, to the present time	10,000 00
16. Cost of 390 feet of fence on retaining wall south of Asylum street	150 00

27. Said commission heard said company in 1891 on item 15 of said bill, and took the following action thereon:

Voted, That claim A, No. 15 of the bill of items claimed for allowance in favor of the New York & New England Railroad Company, as filed June 9th, 1891, and hereunto attached, be disallowed for the reason that we find that the removal of the buildings was not in consequence of the order of this commission passed December 20th, 1888.

Voted, That claim B, amounting to the sum of $5,169.57, be allowed as a part of the entire expense of the improvement, and it is ordered to be paid accordingly.

Voted, That claims C, D and E be disallowed on the ground that the damages, if any, are not special to the New York & New England Railroad Company, to be taken account of as a part of the entire expense of the improvement, but such as are incidental to the carrying out of the design and instructions of the legislative acts creating and regulating this board, and for public safety, convenience, and necessity.

28. Afterwards the city of Hartford appeared before said commission and moved that the claims of said company embraced in items

3 to 13, inclusive, of said bill, with the exception of item 9, be disallowed on the ground that each and every claim therein specified was, as set forth, in the nature of damages merely incidental to the carrying out of the design and instructions of the legislative acts creating and regulating the board, and for public convenience, safety and necessity; and that said board had, by a vote of July 14th, 1891, above recited, refused to allow such damage as part of the expense of the improvement; and further, that item one be disallowed because the land purchased by the railroad company was no part of the expense of the improvement, but accrued to the sole convenience and advantage of the New York & New England Railroad Company; and that items 2 and 14 be disallowed as a claim arising out of the order of the city of Hartford made and executed within its corporate capacity, and not in any way related to the work of the commission; and that item 9 be disallowed, as damage occasioned, if at all, by the fault and choice of the railroad company, and for which the other parties should not be charged.

22

29. In fact, said city of Hartford, after April 4th, 1884, and with a view to making Asylum street more convenient for public travel, especially with reference to access to and egress from the new depot constructed near and adjacent to the elevated tracks, had ordered Asylum street to be widened by adding an additional strip on the south side ten feet in width, and proceedings had been had under the city charter to accomplish said widening, in which notice was given to all parties in interest except the two railroad companies, the widening of said street extending for some distance west of said railroad location.

30. Said motion was argued by counsel, and said company was heard in opposition thereto before said commission, and thereupon, on June 2d, 1892, said commission granted said motion, so far as regards items 2 and 14 of said bill, for the reasons specified therefor in said motion; and as respects items 3, 4, 5, 7, 8, 10, 11, 12 and 13, on the ground that the damages, if any, so claimed were not special to the New York & New England Railroad Company, to be taken account of as a part of the entire expense of the improvement, but such as were incidental to the carrying out of the design and instructions of the legislative acts creating and regulating said board, and for public safety, convenience and necessity; and said commission allowed items 1, 6 and 16 of said bill, and voted that they deemed item 9 a proper one, and allowed it, subject to the final liquidation thereof, when judgment was rendered in a certain suit now pending by John Beattie against said companies, in this honorable court.

31. Each and all of the several items in said bill disallowed as aforesaid, to wit: items 2, 3, 4, 5, 7, 8, 10, 11, 12, 13, 14 and 15, excepting claims A and B, were for damages to the New York & New England Railroad Company which said commission had power under said legislative acts to take account of as a part of the entire expense of the improvement authorized under the act of April 4th, 1884, and the several amendments thereto, and said commission

ought to have inquired, and ought now to inquire into the facts concerning each of said several items; and if said company maintains by proper proof its said claims for damages, the same ought of right to be allowed by said commission.

23 32. Said commission granted said motion without hearing evidence so far as to disallow said items above mentioned, on the ground, as hereinbefore expressed, that they had no jurisdiction or power to consider the same or award damages as claimed, even though the same could be made out to their satisfaction, as having been actually incurred, by proper evidence. By reason of the premises said company has been deprived of any hearing on said several items of damages disallowed June 2d, 1892, and its claims under item 15, except claims A and B, have been each and all disallowed under an erroneous construction of law by said commission, as aforesaid.

33. If said law bears the construction given to it by said commission, as aforesaid, the property of said company has been taken for public use without just compensation, and it has been deprived of this property without due process of law, and said law so construed would deprive said company of the equal protection of the laws, in violation of the Constitution of the United States and of the State of Connecticut.

34. Said commission is estopped by its said compromise agreement hereinbefore recited from setting up and maintaining said construction of said laws.

Said attorney therefore moves this honorable court to issue a writ of mandamus requiring said George M. Woodruff, William H. Hayward, William O. Seymour, Morgan G. Bulkeley, and Nathaniel Wheeler, acting as a board of commissioners under said act of April 4th, 1884, and the acts supplementary thereto, and commonly known as the Asylum-street bridge commission, to inquire into the merits of each and every of said claims so disallowed by them, except claim A of item 15, and to order just damages to be allowed to the New York & New England Railroad Company, if any such damages be established by proof, as a part of the expense of said improvement, or otherwise, to be paid or apportioned agreeably to said act of April 4th, 1884, and the several acts amendatory thereof; or to signify a cause to the contrary thereto to this court, to be holden at New Haven, within and for the county of New Haven, on the first Tuesday of October, 1892.

Dated at New Haven, this 23d day of June, 1892.

TILTON E. DOOLITTLE,
State's Attorney for New Haven County.

24 NEW HAVEN COUNTY, *ss:*

NEW HAVEN, *June 23d*, 1892.

Then and there personally appeared D. S. Plume, to me personally known, and made oath to the truth of the facts stated in the foregoing motion, to the best of his knowledge and belief; and

further, that he is and has been ever since the year 1888 a director of the New York & New England Railroad Company.

Before me—

EDWIN A. SMITH,
Commissioner of the Superior Court for New Haven County.

SIMEON E. BALDWIN,
Attorney for Relator.

STATE OF CONNECTICUT *ex Rel.* The New York & New England Railroad Company *vs.* THE ASYLUM STREET BRIDGE COMMISSION.	Superior Court, New Haven County, June 24th, 1892.

Upon reading the foregoing motion or information by Tilton E. Doolittle, State's attorney, on the relation of the New York & New England Railroad Company, acting therein by David S. Plume, one of its stockholders and directors, and verified by his affidavit, it is

Ordered, that a rule be entered that said George M. Woodruff, William H. Hayward, William O. Seymour, Morgan G. Bulkeley, and Nathaniel Wheeler, commissioners under an act of the General Assembly approved April 4th, 1884, and sundry acts amendatory thereof, and commonly known as the Asylum-street bridge commission, show cause, if any they have, why a writ of alternative mandamus should not issue against them upon said motion, before this court, at ten o'clock a. m., on the first Thursday of September, 1892, or as soon thereafter as counsel can be heard thereon; and that notice be given to them of the filing of said motion or information, and of this rule by a sheriff or deputy sheriff for New Haven county, or other proper officer, by leaving a copy, certified by the clerk of this court, of said motion or information and of this order, with or at the usual place of abode of George T. Utley, clerk of the Asylum-street bridge commission, and a like copy with or at the usual place of abode of George M. Woodruff, chairman of said commission, on or before the last day of June, 1892.

By order of court.

EDWARD A. ANKETELL, *Clerk.*

STATE OF CONNECTICUT, *Hartford and Litchfield Counties*, ss:

TOWNS OF HARTFORD AND LITCHFIELD, *June 27th*, 1892.

Then I left in service two true copies of the foregoing motion or information, affidavit and order of notice, certified by Edward A. Anketell, Esq., the clerk of the superior court as aforesaid, by leaving one of said copies with the within-named George T. Utley, in said town of Hartford, and by leaving the other of said copies at

the usual place of abode of the within-named George M. Woodruff, in said town of Litchfield.

Attest: J. W. POND,
A Deputy Sheriff of New Haven County.

Fees.

Travel, 134 miles	$13 40
2 services	24
3 indorsements	36
	$14 00

STATE OF CONNECTICUT *ex Rel.* THE New York & New England R. R. Co.
vs.
THE ASYLUM STREET BRIDGE COMMISSION.

Superior Court, New Haven County, June Session, 1892. September 6, 1892.

Motion to Quash.

The defendants move that this motion for a writ of mandamus may be quashed, and that they be hence dismissed with their costs, and for reasons for such motion plead and say:

1. The motion of the plaintiff and all and singular the matters therein contained are insufficient in law.

26 2. It appears from the motion and the acts therein referred to that the party defendant in this proceeding is The State of Connecticut, and that the proceeding is, in effect, an action against the State.

3. The party denominated in the original motion The Asylum Street Bridge Commission is constituted under the provisions of the acts of the legislature of the State as referred to in the motion, and clothed with powers as therein set forth, and charged with official judgment and discretion in the exercise of its powers and the discharge of its duties, as set out in the motion and the acts therein referred to.

4. The commission has exercised its powers and discharged its duties, as set out in the motion.

5. It appears from the motion, and the acts therein referred to, that parties other than the respondent, who are not made parties to this proceeding, would be affected by the writ prayed for.

6. It does not appear from the motion or the acts therein referred to that the superior court is given any powers, original or appellate, over the commission, or any jurisdiction to review its judgments, or compel its action.

7. It does not appear, nor is it claimed, in the motion, that the commission, in finding and holding, as set out in the motion, that they would not allow the items of damage specified in the bill of the plaintiff company because the commission found and adjudged that they were not special to said company, but only incidental to the carrying out of the design and instructions of the legislative acts referred to in the motion, and for public safety, convenience and

necessity, in any way discriminated against the plaintiff company as to these items, or treated the claims of this company in anywise differently from the disposition made of all claims for similar incidental damage on behalf of The N. Y., N. H. & H. R. R. Co., and on behalf of The City of Hartford, the other parties to the proceedings, and who, with the relator, caused the public nuisance which the commission was appointed to abate; nor does it in any way appear from the motion that the commission did otherwise than to order that the plaintiff company should pay and bear such incidental damage as part of its share of the expense of the improvement.

8. It appears from the motion and the acts therein referred to that the commission is clothed with all the powers of the General Assembly, so far as the same can be lawfully delegated in the premises, and may "make any and all orders relating to said
27 improvements and to all matters and things relating thereto which they may deem necessary and proper, in the same manner and to the same extent as the General Assembly might do and direct," and that this proceeding is an attempt to mandamus the legislature of the State of Connecticut.

9. It appears from the motion and the acts therein referred to that the commission, if regarded as officers at all, are in no sense ministerial officers charged with the performance of merely ministerial duties, but that their powers and duties are legislative, judicial, executive, and discretionary, and that their duties have been performed, or are in the process of performance.

10. It appears from the motion and the acts therein referred to that all and singular the doings of the commission in the premises were the exercise of the police power of the State, directed to the protection of human life by means reasonably adequate to that end.

11. The question of the constitutionality of the acts referred to in the motion cannot be tried by this proceeding.

12. Mandamus is not a proper proceeding for the interpretation of the acts of the legislature set forth in the motion.

13. All the questions raised in the original motion as to the meaning and constitutionality of the acts of the legislature, and the validity of the doings of the commission, were raised in the various courts under the legal proceedings set out in the motion, and abandoned, as therein set forth.

14. The plaintiff company, having abandoned its said claims before the courts as set forth in the motion, and the commission having proceeded to judgment thereon upon the principles enunciated in its decision as contained in the motion, the plaintiff waived all right, if any it had, to raise the same in this or any other proceeding.

15. The Asylum-street bridge commission in performing the official duties imposed upon it by law, as set out in the motion, is exercising executive functions of a governmental nature, and its members, if officers at all, are executive officers of the government; and whether its interpretation of the law under which it

acts be correct or mistaken it cannot be controlled or interfered with by mandamus.

16. The writ prayed for is granted or refused in the sound discretion of the court. This discretion is invoked in favor of a plaintiff who has voluntarily submitted its alleged grievances, as appears in the motion, to a tribunal of its own choice, and being
28 dissatisfied with the decision undertakes by mandamus to compel them to decide otherwise, and to substitute the judgment and discretion of the superior court for their own.

17. It appears from the motion and the acts therein referred to that the matters and things complained of were simply "acts done in the proper exercise of governmental powers," and do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the State or its agents, or give any right of action.

18. It appears from the motion and the acts therein referred to that there has been no taking of the relator's property, but at most only a prohibition of its use in a particular way, obnoxious to public safety.

19. It cannot be held "that a duty which the State has most justly imposed upon the applicant as its share towards the protection of life should be turned into an element of damage for which compensation must be made when circumstances arise which create that duty."

20. The judgment of the commission heretofore made, after fully hearing the relator's claims and witnesses, that taking up the tracks, etc., was a part of the relator's duty in removing the nuisance sought to be abated by the several legislative acts, is final and conclusive, and cannot be reviewed.

21. The judgment of the commission after full hearing of the relator's claims and witnesses, that the relator sustained no special damage by the removal of the tracks, etc., is final and conclusive, and not subject to review.

22. The judgment of the commission after full hearing of the relator's claims and witnesses, that the damages complained of were only incidental to the removal of the nuisance, is final and conclusive.

(23.) The judgment of the commission that the relator sustained no special damage in the matters complained of in its application is final and conclusive.

(24.) The commission are, by the several acts of the legislature, declared in the motion, clothed with such deliberative, judicial and other powers as are not subject to review or control by mandamus of another judicial tribunal.

(25.) The powers of the commission are wholly governmental and discretionary, and are not the subject of mandamus.

29 (26.) The prayer of the motion is at variance with the nature and purposes of the writ. Mandamus lies to compel action in a proper case where the respondent refuses to act, not to

dictate what a tribunal with discretionary and judicial powers shall do in a hypothetical case.

THE ASYLUM STREET BRIDGE COMMISSION,
By ROBINSON AND HENNEY,
Their Attorneys.

THE STATE *ex Rel.* THE NEW YORK & New England Railroad Company
vs.
THE ASYLUM STREET BRIDGE COMMISSION.
Superior Court, New Haven County, October 19, 1892.

Notice of Appeal.

The plaintiff in the above-entitled cause appeals from the judgment rendered therein to the supreme court of errors.

By SIMEON E. BALDWIN,
Its Attorney.

THE STATE *ex Rel.* THE NEW YORK & New England Railroad Company
vs.
THE ASYLUM STREET BRIDGE COMMISSION.
Superior Court, New Haven County, October 21st, 1892.

Plaintiff's Appeal.

In the above-entitled cause the plaintiff appeals from the judgment of said court to the supreme court of errors, to be held at Bridgeport within and for the third judicial district, on the fourth Tuesday of October, 1892, for the revision of the errors which it claims to have occurred in the trial thereof; and for reasons of said appeal it assigns the following, viz:

1. That the plaintiff's application was held insufficient in the law.
30 2. That a writ of mandamus was not granted thereon.
3. That said motion to quash was granted.
4. Because none of the causes alleged in said motion to quash were sufficient to justify granting said motion.
5. Because each of said causes severally and respectively (a particular reference to each being herein omitted to avoid prolixity) was insufficient in the law.
6. Because the plaintiff's application was sufficient to call for all and singular the relief therein applied for.
7. Because if not sufficient to call for all and singular said relief it was sufficient as to part of such relief, and a writ of mandamus should have been molded and issued accordingly.
8. Because a motion to quash does not lie to such an application on the return of a rule to show cause, and therefore said motion

should have been overruled, and an alternative writ of mandamus issued.

9. Because said Asylum-street bridge commission ought to have proceeded and ought now to proceed to hear proof and adjudicate as to each and all of the claims of said relator for damages, specified in said application.

10. Because the record in this cause shows a great injury to the relator, and the denial of any remedy therefor.

11. Because if said several acts of the General Assembly are to be construed, as they were by the superior court, as denying any remedy by mandamus, or excluding any right of the relator to the damages by it claimed, as described in said application, or any of them, or to recover the same, or excluding the powers of said defendants to allow the same, then said acts are, so far forth, void as contrary to the constitution of Connecticut, and of the United States, and to the XIVth amendment to said Constitution, and the plaintiff's motion should therefore have been granted.

It therefore prays for such relief as is provided by law in the premises.

THE STATE OF CONNECTICUT ON THE RELATION OF THE NEW YORK & NEW ENGLAND RAILROAD COMPANY,
By SIMEON E. BALDWIN, *Its Attorney.*
T. E. DOOLITTLE,
Attorney to the State for New Haven County.

31 I certify that the foregoing appeal was filed on the 21st day of October, A. D. 1892, and that Simeon E. Baldwin, Esq., of New Haven, is recognized in the sum of $50, conditioned that the plaintiff shall prosecute said appeal to effect, and pay all costs therein if it fail so to do; and said appeal is hereby allowed.

JOHN S. FOWLER,
Assistant Clerk.

At a superior court held at New Haven, in and for New Haven county, on the 14th day of October, A. D. 1892.

Present: Hon. John M. Thayer, judge.

THE STATE *ex Rel.* THE NEW YORK & NEW ENGLAND RAILROAD COMPANY *vs.* GEORGE M. WOODRUFF, of Litchfield; William H. Hayward, of Colchester; William O. Seymour, of Ridgefield; Morgan G. Bulkeley, of Hartford, and Nathaniel Wheeler, of Bridgeport, Constituting and Known as the Asylum Street Bridge Commission.	Superior Court, New Haven County, October 14, 1892.

Judgment.

This action, by application for a writ of mandamus, came to the June session of this court, 1892, and thence by continuance to the

present term, when the parties appeared, and the defendants filed a motion to quash; and the court having heard the parties thereon finds the issues for the defendants, and that said application of the plaintiff is insufficient in the law. Whereupon it is adjudged that said motion to quash be granted and said application denied.

THAYER, *Judge.*

32 From this judgment the plaintiff appeals to the supreme court of errors at its term next to be held at New Haven, in and for the third judicial district, on the fourth Tuesday in October, A. D. 1892; and Simeon E. Baldwin, Esq., of New Haven, is recognized in the sum of $50, conditioned that the plaintiff prosecute said appeal to effect and pay all costs therein if it fail so to do.

A true copy of record.

Attest: EDWARD A. ANKETELL, *Clerk.*

Certified by—

EDWARD A. ANKETELL,
Clerk of the Supreme Court of Errors.

33 STATE *ex Rel.* NEW YORK & NEW ENGLAND R. R. Co.
vs.
THE ASYLUM STREET BRIDGE COMMISSION.

Supreme Court of Errors, Third Judicial District, January Term, 1893.

Opinion of the Court.

FENN, *J.:*

The application to the superior court for an alternative mandamus against the defendant states that subsequent to the decision of this court in Woodruff *v.* N. Y. & N. E. R. R. Co., 59 Conn., 63, and pending further litigation, both in the Federal and State courts, there was a conference between the representatives of said defendant, of the relator, whom we will call the plaintiff, and of the city of Hartford, which resulted in a compromise and arrange-

34 ment of settlement pursuant to which the surface tracks of the plaintiff's railroad between the north line of Church street and Asylum street, in Hartford, were taken up, and the plaintiff presented to the defendant commission a claim for damages for such removal and for sundry other matters of damage to the plaintiff incident to the general elevation of its tracks over Asylum street and the changes necessarily consequent thereon; that the commission heard the plaintiff, allowed certain claims, disallowed others as not arising in consequence of any order of the commission, concerning which disallowance no complaint is made, and also in reference to certain other items disallowed them on the ground,

35 as stated by the commission, "that the damages, if any, are not special to the New York & New England R. R. Co. to be taken account of as a part of the entire expense of the improvement, but such as are incidental to the carrying out of the design

and instructions of the legislative acts creating and regulating this board and for public safety, convenience, and necessity."

Such items were as follows:

"Land of the company taken for retaining wall running north from Church street about 890 feet, and amounting to about 6,900 square feet, $15,600.00.

Destruction of old station building on Spruce street and loss of rentals received and receivable therefrom, $45,000.00.

36 Cost of resurfacing temporary tracks on each side of Asylum street, $1,224.71.

Amount paid to administrator of John Connelly, who lost his life while employed by the company on work ordered by the commission, $150.00.

Cost of extra switching freight and passenger trains due to interruption of the tracks in consequence of the work ordered by the commission, $6,792.40.

Salary of additional telegraph operators from June 1, 1887, to June 30, 1889, $1,250.00.

Cost of fitting up temporary office made necessary by destruction of old station, $320.28.

And rent of temporary office from Oct. 1, 1887, to June 30, 1889, $749.97.

Cost of temporary station for use until elevated structure was completed, $4,143.71.

37 Additional cost of transporting baggage between the temporary stations of the two roads on each side of elevated structure, $1,305.00.

Difference between the value of the land between Church and Asylum streets for the purpose it can now be used for and its value for railroad purposes, as it could have been used prior to the removal of the tracks on Church street, $200,000.00.

Impairment of value of yard north of Church street, consequent on changes incident to the work ordered by the commission and to the removal of the tracks across Church street, $100,000.00.

Damage from interruption of use of territory between
38 Asylum street and Walnut street from April, 1887, to the present time, $10,000.00."

The application alleged that all of these disallowed items were for damages to the plaintiff, which the commission had power, under the legislative acts, to take account of as a part of the entire expense of the improvement, and that the commission ought to have enquired into the facts concerning such items, and, if maintained by proper proof, to have allowed them, but that they were disallowed on motion of counsel for the city of Hartford without hearing evidence as to their merits and for the reason before stated, and the application concludes with a motion that an alternative writ of mandamus issue requiring the commission to
39 inquire into the merits of these claims, and, if any such damages shall be found to be proved and justly due, to order their allowance and payment as a part of the entire expense of the Asylum-street bridge improvement. The superior court having

granted a rule to show cause, the defendant filed a motion to quash, presenting various legal issues not necessary to recite.

The court found these issues for the defendant, and that the application was insufficient, and thereupon granted the motion and denied the application, and the plaintiff appealed to this court, which heard and refused the defendant's motion to erase the case from the docket, and afterwards the parties were fully heard upon
40 all the grounds presented by the plaintiff's reasons of appeal.

These reasons need not be enumerated, since they may be fairly held to present and cover all phases of the broad general question, Ought the writ to issue and was the judgment of the superior court denying it erroneous? The first subordinate inquiry under this general one is whether the action of the commission is subject to direction by mandamus. Manifestly a negative answer will dispose of the case. What, then, are the powers which the legislature have conferred upon the commission? The answer may be found in the language of the acts which created it, quoted at length in the 59th Conn., pp. 667, '8. It is expressly declared in sect. 4 of the amended act of 1885, as there printed, that the commission shall possess all of the powers of the Gen-
41 eral Assembly, "and they may direct by whom, when and how, the work shall be performed, and who shall pay for the same, and what proportion of the entire expense, including land damages, each party shall pay and bear; and they may, in the event of any disagreement between the parties, determine the cost of the whole or any portion of the work, and make any and all orders as to the manner and amount of payment, which they may judge reasonable: Provided, however, that in no event shall said city of Hartford be required to pay any portion of the cost of any changes in the present depot, and not exceeding one-half of all the other expenses, including land damages incurred under this
42 resolution." It would seem as if, subject only to the limitation upon the assessment against the city of Hartford, no grant of power could be more plenary or conferred in more explicit and unqualified terms, and that the duties to be performed by the commission were such as, in the highest degree, to call for the exercise of judgment and discretion, and that a writ of mandamus will never issue "in a case where the effect of it is to direct or control an executive officer in the discharge of an executive duty involving the exercise of discretion and judgment" has been so often decided by this court and is so fundamental that, to borrow the language of Judge Loomis in Batters *v.* Dun-
43 ning, 49 Conn., 480, it "is too obvious to require the citation of any authorities." It is only fair to the plaintiff to say that it does not assume to claim that the commission, in the use of its discretion in the exercise of the powers conferred and the discharge of the duties imposed upon it by the legislature, is subject to judicial interference by mandamus. The contention is that it is by the legislative authority made the duty of the commission to find and then to apportion between the two railroad corporations and the city of Hartford the entire expense, loss,

and damages to all caused by or resulting from the execution of the orders made by such commission; that while as to the amount of such damage and as to its relative apportionment, subject, of
44 course, to the limitations relating to the city of Hartford, the judgment of the commission is exclusive and final, the duty to find and to apportion the entire amount is direct, positive, perfect, and that such duty is therefore not the exercise of a discretionary power by the commission, since, in regard to it, it has none, but to it a matter of plain duty and to the plaintiff of absolute right; that hence, if the commission fail to discharge such duty, the court will lend its aid, by mandamus, to the plaintiff to compel such performance and to enforce such right, and the plaintiff claims further that if it shall be held that it is within the discretion of the commission to determine whether the rejected items of claimed damage to the plaintiff ought or not
45 to be considered and apportioned as a part of the entire expense, that it is manifest from the recorded and recited action of the commission that it utterly failed to exercise that discretion and refused to consider such items solely because of an erroneous idea that it was not within its jurisdiction to do so, and that such an error can be corrected and can only be corrected and remedied by mandamus, which will declare the true extent of the jurisdiction of the commission and direct its full exercise, namely, that the commission "inquire into the merits of the damage claims presented, and if any such damage shall be proved and found to be justly due to order their allowance and payment as part of
46 the entire expense of the Asylum-street bridge improvement." Now, while the general principles relating to mandamus, upon which the plaintiff relies in this contention—that is to say, that where it appears or can be proved that there is a fixed, definite, precise act, which it is the absolute duty of a public officer to do in a particular way and at a particular time, which has arrived, and the clear legal right of a party to have so done, a right concerning a substantial matter, and there is no other legal remedy, the performance of such act, of such duty, the enforcement of such right, can be secured by mandamus, and also that the exercise of existing discretion by the officer vested with it may itself be an act of such fixed, definite, and precise nature, and so the absolute duty of the officer,
47 and right of a party that such officer may become compelled by mandamus, in case of refusal, no matter what the ground of such refusal may be, to exercise such discretion, to hear and determine, although as to such determination, beyond the simple direction to make it, he must be left free. While these doctrines seem well settled and have been affirmed by this court in repeated decisions, in order to warrant the plaintiff in the application which it would make of such doctrines and the result which it claims it would be necessary in reference to the first part of its contention that it was mandatory upon the commission to take these items into their consideration, to construe the language of the legisla-
48 ture which we have quoted very different from the natural

and ordinary import of the language used. That language apparently had strict reference to work to be ordered and directed done by the commission, concerning which it was declared that the commission might "direct by whom, when, and how the work shall be performed and who shall pay for the same and what proportion of the entire expense, including land damages, each party shall pay and bear, and they may, in the event of any disagreement between the parties, determine the cost of the whole or any portion of the work." So clearly is this language, both by its context and by its terms, confined and limited to "expense" and "cost" of "work," that it was deemed necessary to expressly say "including land damages," lest otherwise even the cost and expense of land, which the preceding section authorized the railroad companies and the city of Hartford to take, might be regarded as not included. We may add that the proviso as to the city of Hartford which follows the language just quoted—that said city should not be "required to pay any portion of the cost of any changes in the present depot or of the construction of any new depot"—adds confirmation to this intent. It would seem idle to protect the city from any items of cost actually incurred in any changes if at the same time it was left open to liability for what might be found infinitely greater sums for speculative, consequential, and incidental damages and loss resulting from such changes or improvements. But in order to support the plaintiff's claim it must be held that notwithstanding this language of the legislative acts or, rather, as we shall presently show, by virtue of such language it was, it thereby became, the duty of the commission, in the words of the plaintiff's brief, "to estimate the entire expense of the improvement, in accordance with the ordinary rules of law." It is the duty of the commission to ascertain the entire expense. If the items of expense which we present are such as in a court of law should be considered in estimating the entire expense, the commission in refusing to consider them has simply refused to do that which the law expressly directs it to do. It was not an act which they could do or refuse to do at discretion." It seems to us that the plaintiff reaches this conclusion only by a confusion of terms and things. There is in this case no occasion to inquire what items of damage to the owner are or may be considered when private property is taken for public use through the exercise of the right of eminent domain. No such property—no property of the plaintiff—was so taken. The plaintiff admits in its brief that it was held by this court, in the two cases in which these acts were considered—Woodruff *v.* Catlin, 54 Conn., 277, and Woodruff *v.* N. Y. & N. E. R. R. Co., *supra*—that the power exercised by the State through the commission was the police power in abating a nuisance; that it was not contemplated that the public should pay anything by way of compensation or damages to the three corporations or any part of the expense of the improvement; that such improvement was a duty of such corporations and its expense a debt that they must pay. "The debt

to be paid the public is due from three, and the question arises as between them what each has to pay or bear." There is certainly no rule of common law, flexible or inflexible, by which this question can be decided. The only right of either of these tort feasors to contribution from the others or to apportionment of damages incident to the carrying out of the plan must be derived from the language used by the legislature. N. Y.
53 & N. E. R. R. Co.'s appeal from commissioners, 58 Conn., 532; Woodruff *v.* Catlin, *supra*. The plaintiff, however, claims to be substantially supported in this contention by the language used by this court in Woodruff *v.* N. Y. & N. E. R. R. Co., *supra*, p. 93, where, in referring to the expense to which the company alleged it would be subjected in carrying out the order of the commission concerning the removal of surface tracks, it was said "that is an argument to be addressed to the commission. So far as we have been able to examine we find no reason why the commission might not take any special damage to the defendant or to the city of Hartford or to the New York, New Haven & Hartford
54 R. R. Co. into account as part of the entire expense and determine what proportion each should bear, subject only to the limitations fixed in the resolutions." It is unnecessary to determine what we might consider "special damage," or whether upon further examination than we felt called upon to make in the former case or as seems called for in this we might or might not find reason why the commission might not take any item of the plaintiff's bill for such alleged damage into its consideration and apportionment as a part of the entire expense, for it is evident that the language used by this court carries with it no intimation of an opinion concerning the duty of the commission in the matter. It is rather declaratory in another way of
55 what had been previously stated in the opinion and in a quotation there made from the earlier opinion in Woodruff *v.* Catlin, *supra*, that the power and discretion of the commission in the premises was as unlimited as that of the legislature itself. Assuming, then, as we may, that the commission possessed the power to consider each and every item of the plaintiff's claim, the question of how far it was reasonable to go in the exercise of that power is one which the legislature intended, and wisely, to leave to the sound judgment and discretion of its chosen instrumentality and one whose orders it was directed should be "obligatory upon all parties" and from which no appeal was allowed and of which
56 no revision was contemplated. Indeed, what items of claimed damage are "special," so as to be considered in any legitimate sense as entering into the "expense of an improvement," and what are not so can rarely, if ever, in any case be a pure, unmixed question of law, but must generally be more largely dependent upon particular conditions of facts. Thus, for illustration, one of the items of the plaintiff's bill reads thus: "Land of the company taken for retaining wall," the conceded facts in reference to such item being that no land was taken in any other way than that such as was previously occupied for railroad purposes in connection with

surface tracks was now used for the foundation of the viaduct
57 which carried the elevated and substituted tracks of the plaintiff's railroad. It would seem manifest that the authority best fitted for the determination of such questions arising in relation to a given work, other things being equal, would be the one which knew, and whose duty it was to know, the most about them, and equally manifest that in this instance such authority is not the superior court, whose interposition is invoked. And when it is the unquestioned and fully conceded power of the commission to determine in what proportion each party shall pay and bear the expense of the change and improvement, it would seem to be within
58 a reasonable exercise of that power, according to its true intent and spirit, that, treating as a proper matter of expense, these items (not of actual author-y, or not as in the direct execution of the work, but of incidental loss, matters from their very nature incapable of precise, definite computation and ascertainment) should by the commission be apportioned between the parties by mutual offset, each bearing its own incidental loss as a due apportionment and adjustment of the entire burden, a way which, for ought we know, may be pre-eminently most fair and equitable.

But, finally, as we have seen, it is contended that if the commission possessed such discretion they failed to exercise it, the
59 recorded action showing, as is claimed, that it disallowed the plaintiff's claims because of the want, as it judged, of jurisdiction or power to entertain them. We do not so construe the language used, which was that the claims aforesaid "be disallowed, on the ground that the damages, if any, are not special to the New York & New England Railroad Company, to be taken account of as a part of the entire expense of the improvement, but such as are incidental to the carrying out of the design and instructions of the legislative acts creating and regulating this board." Now, this language, while plainly showing the ground on which the claims were disallowed—that is to say, the rule which the commis-
60 sion adopted for its guidance, in the allowance and disallowance of claims, does not, in any wise, indicate why such rule was adopted, whether because, as the plaintiff claims, the commission held such view as to the limits of its jurisdiction, or because it considered such a rule most fair and just to all parties. In the absence of such indication the latter reason is to be presumed. Such presumption has close analogy to one which this court declared to exist in State *v.* Alford, 31 Conn., 40–46. In view of the language used by this court in Woodruff *v.* N. Y. & N. E. R. R. Co., *supra*, on which the plaintiff so much relied, the commission could hardly have doubted its power in this regard, while from that used by our lamented associate, Judge Seymour,
61 in the opinion of the court in the N. Y. & N. E. R. R. Co. *v.* City of Waterbury, 60 Conn., 9, 10, it could hardly have questioned our views in reference to such elements of damage. In that case, after citing from the former decisions of this court, in the City of Bridgeport *v.* N. Y. & N. H. R. R. Co., 36 Conn., 64, in which, referring to items of damage similar to at least some of

those claimed by the plaintiff, it was said, "all such claims for damages and all claims that were not direct and immediate burdens have been uniformly holden too contingent and remote to be the basis of assessment for damages." And after disposing of a claim in substance repeated by the plaintiff in this case that the rule must be the same as when land of a manufacturing company was
62 taken for a highway, and that the land being so in such cases that if the factory building must be raised or lowered, shored up or moved in consequence, the company must be paid enough to make good the expense so necessitated; therefore the same rule must be adopted in favor of the railroad company and saying, "but the cases stand upon a very different footing. In one the damage is the direct, natural, unavoidable result of the taking. In the other the damage is in no way, directly or indirectly, naturally connected with the taking, but artificially and by means of a statute which has respect to the safety of the public and not to the damage of the party whose property is taken or to the benefit of the party who takes it." The opinion uses this most emphatic language: "We cannot hold that a duty which
63 the State has most justly imposed upon the applicant, as its share towards the protection of life, should be turned into an element of danger, for which compensation must be made, when circumstances arise which create the duty." These expressions, used in a case in which the present plaintiff was a party and in reference to an actual expenditure or outlay by the company, will apply with added weight to a claim for reimbursement for damage, purely incident to the fact that the use of its land for grade crossing—"a public nuisance, dangerous to human life"—was more profitable to the plaintiff in the exercise of its franchise from the State, in the way which suited it best, than its use
64 for a safe, because elevated, crossing, with the consequent protection of life thereat, would be.

But it is urged by the plaintiff that if the acts relative to the Asylum-street bridge commission admit of such construction as to warrant the action taken by the commission, they are unconstitutional. No argument in support of such contention has, however, been advanced, or could be, as it seems to us, not already addressed to, met, and answered by this court in previous and recent decisions concerning these acts and other legislation relating to grade crossings. Woodruff *v.* Catlin, *supra;* Woodruff *v.* N. Y. & N. E. R. R. Co., *supra;* N. Y. & N. E. R. R. Co. *v.* Waterbury, *supra;* N. Y. & N. E. R. R. Co.'s Appeal, *supra;* Town of Westbrook's
65 Appeal, 57 Conn., 95. Respect for these, our own former, decisions prevents our further consideration of this claim.

The line of reasoning which we have adopted and the conclusion to which we have thereby been brought also makes it unnecessary to examine other grounds upon which the same result might, perhaps, have been reached.

There is no error in the judgment appealed from.

In this opinion Andrews, C. J., Torrance and F. B. Hall, J's, concurred. Carpenter, J., dissented.

The foregoing is a true copy of the original opinion as filed with the reporter of the court, but the opinion is subject to alteration and addition by the judges until printed in the official reports.

JOHN HOOKER, *Reporter.*

66 At a supreme court of errors held at New Haven, in and for the third judicial district, on the third Tuesday in January, A. D. 1893.

Present: Hon. Charles B. Andrews, chief judge; Hon. Elisha Carpenter, Hon. David Torrance, associate judges.

Hon. Augustus R. Fenn, a judge of the superior court, sat with the court on each and every day of the term.

Hon. Samuel O. Prentice, a judge of the superior court, sat with the court on each and every day of the term.

Hon. John M. Hall, a judge of the superior court, sat with the court on the third and fourth days of the term.

Hon. F. B. Hall, a judge of the superior court, sat with the court on the fifth day of the term.

Edward A. Anketell, clerk; Charles A. Tomlinson, Esq., sheriff.

THE STATE OF CONNECTICUT *ex Rel.* THE NEW YORK AND NEW ENGLAND Railroad Company, a Corporation Incorporated in the State of Connecticut, and David S. Plume, of the Town of Waterbury, in New Haven County, a Stockholder of said Company, Plaintiffs,

vs.

67 GEORGE M. WOODRUFF, of the Town of Litchfield; WILLIAM H. Hayward, of the Town of Colchester; William O. Seymour, of the Town of Ridgefield; Morgan G. Bulkeley, of the Town of Hartford, and Nathaniel Wheeler, of the Town of Bridgeport, Constituting and Known as The Asylum Street Bridge Commission, Defendants.

This appeal from a judgment of the superior court rendered on the 14th day of October, A. D. 1892, made by the plaintiffs to obtain such relief as is provided by law in the premises, came to the present term of this court, as by the record of said superior court and said appeal, a copy of which is on file, will fully appear.

The parties appeared and were heard upon the defendants' motion to erase said case from the docket; which motion was denied by the court.

The parties afterward appeared and were heard on said appeal.

And now this court, after inspection of the record and due consideration, find there is no error in the judgment appealed from.

It is therefore adjudged by the court that said judgment be confirmed and established and that defendants recover of the plaintiffs their costs taxed at $—.

68 STATE OF CONNECTICUT:

Supreme Court of Errors, Third Judicial District, New Haven County.

I, Edward A. Anketell, clerk of the supreme court of errors of the State of Connecticut in and for New Haven county, in the third judicial district, by virtue of the foregoing writ of error, filed and served in this court on the 6th day of June, 1893, and in obedience thereto, do hereby make return thereof and of a bond and citation accompanying the same, and do hereby certify that the above and foregoing pages contain a true and complete transcript of the record and assignment of errors and of all proceedings in the case of The State of Connecticut at the relation of the New York and New England Railroad Company and David S. Plume, plaintiffs, against George M. Woodruff, William H. Hayward, William O. Seymour, Morgan G. Bulkeley, and Nathaniel Wheeler, constituting and known as the Asylum-street bridge commission, defendants, as the same remains of record and on file in said office.

And I have annexed to and do hereby transmit with said record a true and attested copy of the opinion of the supreme court of errors of the State of Connecticut filed in said case.

69 In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New Haven, in the State of Connecticut, this 24th day of June, in the year of our Lord one thousand eight hundred and ninety-three.

[Seal Supreme Court of Errors, Con.]

EDWARD A. ANKETELL,
Clerk of the Supreme Court of Errors
Within and for New Haven County,
In the Third Judicial District of the State of Connecticut.

70 Supreme Court of the United States.

THE STATE OF CONNECTICUT at the Relation of THE NEW YORK & New England Railroad Company and David S. Plume, Plaintiffs in Error,

vs.

GEORGE M. WOODRUFF and Others, Constituting the Asylum-street Bridge Commission, Defendants in Error.

Assignment of Errors.

Afterwards, to wit, on the fifth day of July, in the year of our Lord eighteen hundred and ninety-three, at a Supreme Court of the United States, in the city of Washington, in the District of Columbia, come the said plaintiffs in error, by their attorney, Tilton E. Doolittle, and say that in the record and proceedings in the above-entitled matter there is manifest error, to wit:

71 I.

That said act of the General Assembly of the State of Connecticut entitled Providing for bridge at railroad crossing at Asylum street, Hartford, and said amendments thereof having been interpreted by said court as permitting the taking of the said property of the said New York & New England Railroad Company for said public improvement and the infliction of said injuries and damages to the said corporation, as in said application set out, without compensation or remedy for such taking and damages, said act and amendment- are in so far forth void as depriving the said corporation of its property without due process of law and as depriving it of the equal protection of the law, in violation of the Constitution of the United States and the XIVth amendment thereof, and said supreme court of errors erred in holding the same valid and in denying said application in giving effect thereto.

II.

Said court erred in so interpreting said statute and amendment as in said first assignment of error set out, inasmuch as said laws so construed deprive the said corporation of its property without due process of law and deprive it of the equal protection of the laws, in violation of the Constitution and the XIVth amendment thereof.

72 III.

That the said court erred in interpreting said acts as excluding any right of the said corporation to the damages by it claimed, as described in said application, or any of them, and to recover the same, and as permitting the said bridge commission, at its uncontrolled discretion, to deny the same without hearing, and as providing that such denial by the said commission should be final and conclusive, without appeal therefrom or remedy by mandamus, in that under such interpretation said acts are in conflict with the said provision of the Constitution of the United States and the XIVth amendment thereof.

IV.

That the said acts as interpreted by said court as in said third assignment of error set out are in so far void as depriving the said corporation of its property without due process of law and as depriving it of the equal protection of the laws, contrary to the Constitution of the United States and the XIVth amendment thereof, and said court erred in giving effect thereto, and by reason thereof denying to the plaintiff in error the remedy by mandamus applied for.

73 V.

That the said court erred in deciding that by the terms of said act it was not the duty of said commission to consider the said several items of damage to the said corporation in said application set

out as part of the entire expense of said improvement and to decide in regard to them in conformity with the rules of law, but that it was within the power of said commission to allow or disallow said items at its discretion, uncontrolled by law, and that its refusal to allow said claims was final and conclusive, because said ruling permits the taking of the property of the said corporation and the infliction of damage to it without compensation and without remedy and deprives it of its property without due process of law and deprives it of the equal protection of the law, contrary to said provision of the Constitution of the United States and the amendment thereof.

Wherefore the said plaintiffs in error pray that the said judgment of the said supreme court of errors be reversed, and that the said case be remanded; that a writ of mandamus may issue as applied for.

TILTON E. DOOLITTLE,
Attorney for Plaintiffs in Error,
179 *Church St., New Haven, Conn.*

Endorsed on cover: Case No. 15,342. Connecticut supreme court of errors. Term No., 958. The State of Connecticut at the relation of the New York & New England Railroad Company & David S. Plume, plaintiff in error. *vs.* George M. Woodruff *et al.*, commissioners of the Asylum-street bridge commission. Filed July 1st, 1893.

FILED.
APR 2 1894
JAMES H. McKENNEY,
CLERK

163-689

STATE OF CONNECTICUT,

Ex rel. NEW YORK & NEW ENGLAND RAILROAD CO.

AND DAVID S. PLUME

vs.

GEO. M. WOODRUFF *et al.*, COMMISSIONERS, Etc.

WRIT OF ERROR

TO

Supreme Court, State of Connecticut.

No. 958.

Motion to Dismiss with Statement and Brief.

HENRY C. ROBINSON,
Attorney and Counsel for Defendants in Error.

HARTFORD, CONN.:
PRESS OF THE CASE, LOCKWOOD & BRAINARD COMPANY.
1894.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 958.

STATE OF CONNECTICUT, *ex rel.* N.Y. & N.E. R.R. COMPANY AND DAVID S. PLUME *vs.* GEORGE M. WOODRUFF *et al.*, ASYLUM STREET BRIDGE COMMISSIONERS.	*Error to the Supreme Court of Errors of the State of Connecticut.*

MOTION TO DISMISS.

To the State of Connecticut, acting by Tilton E. Doolittle, Esq., State's Attorney, and to the New York & New England Railroad Company and David S. Plume, relators, Plaintiffs in Error:

Notice is hereby given you that a motion will be made in the above-entitled cause on the 30th day of April, 1894, or as soon thereafter as counsel can be heard, to dismiss the writ of error, upon the grounds and for the reasons and upon the authorities herewith served upon you with this notice.

Dated at Hartford, Conn., March 30, 1894.

Henry C. Robinson

Attorney for Defendants in Error, Asylum Street Bridge Commissioners of the State of Connecticut.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 958.

STATE OF CONNECTICUT, *ex rel.* N.Y. & N.E. R.R. COMPANY AND DAVID S. PLUME *vs.* GEORGE M. WOODRUFF *et al.*, ASYLUM STREET BRIDGE COMMISSIONERS.	*Error to the Supreme Court of Errors of the State of Connecticut.*

MOTION TO DISMISS.

And now come the defendants in error, George M. Woodruff *et al.*, Asylum Street Bridge Commissioners of the State of Connecticut, and move the Court to dismiss the writ of error in the above-entitled cause, for the following reasons:

1. There is no federal question arising on the record filed in this Court.

2. No federal question arose in the trial Court, or in the Supreme Court of Errors of the State of Connecticut, which was decided against the title, right, privilege, or immunity set up or claimed by the plaintiff in error.

3. This case involves a statute whose construction by the State Court of last resort adverse to the plaintiff will be respected by this Court.

4. The Supreme Court of Errors of the State of Connecticut, the Court of last resort in that State, in constructing a local statute, the one here in question, has ruled that the law is an amendment of the charter of the plaintiff company, which charter is amendable at the will of the General Assembly of that State.

5. No federal question is necessarily involved in the judgment of the Court below.

6. The error, if error there was, is not in sustaining, but in interpreting the statutes in question.

7. The question on which jurisdiction depends is so frivolous as not to need further argument.

8. If there is a federal question involved in the judgment, the decision of the court below is so clearly right that the writ of error should be dismissed or the decree and judgment affirmed.

9. This suit is an application, or written motion, addressed to the Superior Court for New Haven County in the name of the State by the State's Attorney for that County, for an alternative mandamus. It has been, for an indefinite period, the practice in Connecticut for the several State's attorneys to allow the use of the State's name at the relation of parties applying for mandamus to enforce private rights. Upon the application, the alternative writ was not issued but a rule to show cause against the defendants was made, and upon that hearing, the defendants moved to quash the application for manifold reasons, set forth in the record. The motion to quash was granted, and the applicant appealed from the judgment to the Supreme Court of Errors. That Court dismissed the appeal upon the grounds that the commission was a body whose power was plenary, and that the duties to be performed were such as in the highest degree call for the exercise of judgment and discretion, and that the Superior Court had no power by mandamus to control the acts of the commission; that the commission had acted on the damages, and that their action was just and wise; the entire marginal note made by a distinguished and experienced reporter in the case is as follows:

> "The legislature created a commission to direct and control proceedings for the removal of a dangerous grade crossing in the city of Hartford, the parties being the city and the two railroad companies. By the act the commission was to possess all the powers of the General Assembly in the matter, and were to direct by whom, when and how the work should be done, and what proportion of the entire expense of it, including land damages, each party, with a certain limitation as to the city, should pay. One of the railroad companies presented a claim for a large amount of expense and loss incidental to the change of its track, including the permanent loss of the use of a portion of its

ground for railroad purposes, the whole of which claim the commission disallowed. In a suit for mandamus, at the relation of the railroad company, to compel the commissioners to consider and act upon the claim, it was held: —

"1. That the grant of power to the commission, subject only to the limitation mentioned, was plenary and in the most explicit terms, and that the duties to be performed were such as in the highest degree to call for the exercise of judgment and discretion.

"2. That by the act the items which the commission was to consider were only those of the expense of the work, not of the speculative and incidental damage resulting from the change made.

"3. That if the items claimed were such as the commission might consider and in its judgment allow, yet the legislature had left the matter to the sound judgment and discretion of the commission, and its conclusion, in the exercise of its judgment upon the claim, could not be reviewed.

"4. That as it did not appear whether the commission disallowed the claim because it thought such a course fair and just to all parties, or because it regarded the claim as beyond its jurisdiction, it could be presumed that the former was the case."

From the denial of Judge Thayer below to issue even an alternative writ, the relators appealed assigning eleven reasons of appeal. Rec., pp. 20–21.

The first ten raise no Federal questions, nor does the 11th, excepting in such an argumentative and hypothetical way as to make them immaterial as constitutional points. They beg the question in advance. The Supreme Court paid almost no attention to this claim, as it was scarcely alluded to by the appellants and only, as in their ground of appeal, in a hypothetical way. Other grounds for rejecting the application were urged by the defendants, which were abundantly sufficient to justify the refusal to grant the application, and of which the Court says:

"The line of reasoning which we have adopted, and the conclusion to which we have thereby been brought, also make it unnecessary to examine other grounds upon which the same result might perhaps have been reached."

If the Federal question is in any way before this Court, it is precisely the same one recently disposed of upon the motion to dismiss the writ of error brought by these same parties against the Railroad Commissioners in the Town of Bristol case, opinion announced Feb. 5, 1894. The proceedings never proceeded even to

an alternative mandamus. The State of Connecticut, acting through its Commissioners, is the real defendant in the case, as distinctly declared by the Supreme Court in

Woodruff vs. *N. Y. & N. E. R. R. Co.*, 59 Conn., at p. 87.

It also appears from the Record, pp. 8–11, that these parties abandoned all proceedings to properly test the constitutionality of these acts, and left the judgment against them of our own courts in full force and then made their claims to the Commission, which were all claims of fact and not of law, and, after having procured the abandonment of the summary proceedings against them instituted by the Board of Railroad Commissioners (Record, pp. 11–14), they submitted claims, some of them just and some fanciful, to the Bridge Commissioners, who allowed their just claims and rejected their fanciful claims. When it was too late to reinstate the summary proceedings by the Railroad Commissioners, and without offering to repay the amounts received by them upon their just claims, and with the judgment upon the constitutionality of the laws standing against them, this application was brought to the Superior Court for a mandamus. This writ of error attempts to raise a constitutional question, which is not included in the decision of the State Courts, but which, in another action, was adjudged against them, on precisely the same statute, and between precisely the same parties, and when a writ of error from that judgment was dismissed by this Court at their motion.

10. There was no property of the company taken, and the duty which the order imposed was by due process of law and of laws of equal protection.

11. The writ of error was not allowed by this Court or by the Chief Justice or any Associate Justice.

Wherefore the defendants in error pray that the writ of error be dismissed.

HENRY C. ROBINSON,
Attorney for Defendants in Error.

STATEMENT.

In this case the State of Connecticut is really the defendant although its name is used by the relators.

The writ of error is one of the many actions brought by the relators to embarrass the State in its wise and reasonable policy of eliminating the most dangerous grade crossings in its territory. Asylum Street, in the city of Hartford, is one of the most crowded thoroughfares in the State, and, at the time when the legislature passed the laws in question, was occupied by many tracks of the N. Y., N. H. & H. and N. Y. & N. E. Railroad Companies. The city and the railroad companies were not able to agree upon plans for separating the grades. The General Assembly created this Commission selected for its practical wisdom and experience to accomplish the result. Large powers were given to the Board, and the nature of the acts and the character of the Board and their powers have been declared and adjudged in the three cases in which they have been considered after exhaustive arguments.

See *Woodruff* vs. *Catlin*, 54 Conn., 277.
Woodruff vs. *N. Y. & N. E.*, 59 Conn., 63.
State ex rel. N. Y. & N. E. vs. *Asylum Street Bridge Commission*, 63 Conn., 91.

The acts are as follows:

The original act, Special Acts 1884, p. 1026, differs only from the amended act in a few unimportant particulars.

The amended act is as follows: Special Laws 1885, p. 80.

Resolved by this Assembly: SECTION 1. The city of Hartford, the New York, New Haven & Hartford Railroad Company, and the New York & New England Railroad Company, shall construct a bridge, or other suitable structure, with proper approaches, so as to carry Asylum street in said city of Hartford over the tracks of said railroads, or for the carrying of the said tracks and structure therefor over said Asylum street at or near their present intersection with said street.

SEC. 2 If said city and said railroad shall within three months from the passage of this act mutually agree upon the manner in which said improvement shall be made and paid for by the respective parties, and submit such agreement to the railroad commissioners, said agreement, if approved by said railroad commissioners, may be enforced by either party thereto against any other party in any court of competent jurisdiction. For the purpose of

making said agreement the mayor and court of common council of said city are hereby empowered to act for said city and bind the same.

SEC. 3. Said railroad companies and said city may jointly or severally take any lands which they shall deem necessary to properly carry out said improvement, in the same manner as is now provided by statute for taking land for railroad purposes.

SEC. 4. If said city and said railroad companies shall not, within said period of three months, agree as aforesaid, and submit their said agreement in writing to the railroad commissioners and obtain their approval thereto, then the railroad commissioners, Morgan G. Bulkeley and Henry C. Robinson, both of said city of Hartford, who are hereby constituted and appointed a board of commissioners for the State for said purpose, are empowered and instructed to decide what changes shall be made in the manner in which and the place where in the present line of said Asylum street the tracks of said railroads cross said street, in order to abolish the present grade crossing and insure the safety of the public thereat, and to determine by whom and within what time said changes shall be made. Said commissioners are hereby authorized to order the carrying of said tracks and structure therefor over said Asylum street and direct such a change in the grade of said street in its present line and direction as they shall judge necessary and proper to the end aforesaid, and to order said railroad companies, or either of them, or the receiver or other person or persons operating either of said railroads, to lay out, construct, and maintain a new line or lines of railroad for a distance not exceeding one-half a mile each side of said street, and within three hundred feet of the center line of the present tracks of said railroads, and may require any or all of the present tracks within said limits to be taken up and removed. Said commissioners are hereby authorized and empowered to order and direct a new highway to be laid out across said railroads and for such distance on either side thereof as they may direct, in place of or in addition to said Asylum street. Said commissioners are empowered to make any and all orders relating to said improvement and to all matters and things appertaining thereto which they may deem necessary and proper in the same manner and to the same extent as this General Assembly might do and direct, and they may direct by whom, when and how the work shall be performed, and who shall pay for the same, and what proportion of the entire expense, including land damages, each party shall pay and bear, and they may, in the event of any disagreement between the parties, determine the cost of the whole or any portion of the work, and make any and all orders as to the manner and amounts of payments which they may judge reasonable; *provided, however*, that in no event shall said city of Hartford be required to pay any portion of the cost of any changes in the present depot or of the construction of any new depot, and not exceeding one-half of all the other expenses, including land damages, incurred under this resolution.

SEC. 5. The orders of said commissioners shall be obligatory upon all parties, and they shall be sufficient authority for the auditor of said city to draw his order upon the treasurer of said city for the payment of any sum required to be paid by said city thereby. Said commissioners are authorized to apply to any court of competent jurisdiction, whether of this State or of the United States, for aid in any matter appertaining to said work, and to procure the enforcement and execution of their orders; and the courts of this State and the judges thereof are hereby fully empowered, upon proper proceedings, brought by or at the instance of said commissioners, or any interested party, to enforce by mandamus, or otherwise, the orders of said commissioners made under the authority of this resolution.

SEC. 6. In case the party by whom the changes are to be made or work done cannot agree with the owner of any land or other property required to be removed or taken under the orders of said commissioners, the same, including property already appropriated or used for railroad purposes, may be removed or taken, and the damages assessed in the same manner as is now provided in case of land taken by railroad companies for railroad purposes.

SEC. 7. In the event that said Morgan G. Bulkeley shall refuse or neglect to act, the court of common council of said city of Hartford may appoint some person to act in his stead; and in the event that said Henry C. Robinson shall refuse or neglect to act, said railroad companies may select some person to act in his stead; but a majority of said commissioners shall constitute a quorum, and any orders made by a majority of them shall be the orders of said board of commissioners, and binding as such; nor shall the failure of either said Bulkeley, said Robinson, or their substitutes, to act, in any way affect proceedings under this resolution.

Approved, April 4, 1884.

In 1886 this additional resolution was passed to enable the commissioners to take land of third parties. Special Acts, 1886, p. 212.

Upon the report of the board of commissioners raised by the provisions of a resolution providing for a bridge at railroad crossing at Asylum street, Hartford, passed at the January session, A. D. 1884, it appearing that said board has, in compliance with the terms of said resolution, approved and adopted a plan for said improvement, that it is necessary in the prosecution of said plan to acquire for the purposes of the improvement various pieces of property now owned by sundry parties, that a portion of said property will in all probability have to be condemned and taken by process of law, and that such property can be most expeditiously, conveniently, and economically condemned and taken under proceedings instituted by said board in its own name, be it

Resolved by this Assembly: SECTION 1. That said board of commissioners is hereby, in addition to the powers already conferred

upon it, authorized and empowered to institute and prosecute in its own name, but for the use and benefit of the several parties to said improvement, as the case may be, proceedings for the taking of and appraisal of damages for any land or other property, including any already appropriated for railroad or highway purposes, which in its judgment may be necessary or proper to be taken for the purposes of the improvement which has been or may be ordered by said board under authority of said resolution. The proceedings for appraising damages to persons whose property is condemned shall be in the same manner and form as those prescribed by law for appraising damages for taking land for railroad purposes, excepting as modified by this resolution. The approval of any plan or the adoption of any vote or order which contemplates, necessitates, or directs the use of any property not already owned or appropriated by the party, in the judgment of the board, needing the same for the purposes of the improvement shall be a sufficient condemnation of such property to the purposes and uses of the several parties needing the same, and sufficient evidence that the same is taken for the purposes of public convenience and necessity, and shall fully justify the appointment of appraisers to estimate damages and their appraisal as aforesaid. All property taken under said proceedings shall be deemed to be taken by the party for whose benefit the proceedings are had, and upon their completion and the payment of the damages appraised, the right, title, and interest so taken shall, by virtue of said proceedings, vest immediately and directly in the party for whose benefit and uses said condemnation is made as aforesaid, in the same manner and to the same extent as though said proceedings had been lawfully begun and prosecuted by and in the name of such party.

SEC. 2. The appraisal of damages made upon any proceedings as aforesaid shall, when it has been made, returned, and recorded, have the effect of a judgment, and execution may issue at the end of sixty days from the time when such return is made in favor of the party to whom damages may be appraised and against the party for whose use and benefit the property appraised is appropriated.

SEC. 3. When any payments have been or are to be made for property taken as aforesaid, said board of commissioners may make any order which it may deem proper directing any party to said improvement to contribute to any other party such sum or sums as it may fix and determine, to apply towards said payments.

SEC. 4. Said board may incur any expenses which it shall judge proper to the performance of its duties under said resolution, and to the wise and economical construction of said improvement, and any expense so incurred shall be borne and paid by the parties to said improvement, in such proportions as said board may order.

SEC. 5. The decision or action of said board had by a majority thereof shall in all matters appertaining to its duties under said resolution and the amendments thereto be regarded as the decision and action of said board, and as such shall have full force and authority.

SEC. 6. This resolution shall not be construed as modifying or limiting the powers of said board in any respect as they have heretofore existed, save as expressly provided herein.

Approved, February 19, 1886.

By these acts, control of the highways for a half mile was given to the Commission — the tracks of the two roads crossed Asylum street at the south of the station and Church street at the north. The plans carried the main tracks over the highways and the Commission ordered the two companies to take up their side tracks upon both streets. Their side tracks were at highway grade, and their danger was intensified by the elevation of the main tracks which concealed them. The New Haven company obeyed the command; the relators refused to obey. Mandamus was brought by the Commissioners and obtained after a protracted contest (see 59 Conn., 63.) The relators took out a writ of error in this Court and obtained a supersedeas order. The Railroad Commissioners, at the instance of the city, then brought a suit against the relators, under another statute, for dangerously obstructing a highway with side tracks; by a review of the judgment in this action the plan of delay would not accomplish a supersedeas in the State tribunals. The relators, therefore, apparently abandoned their obstructive policy, and consented to withdraw opposition to the will of the State and discontinue their litigation and to submit claims for damages to the Commission. A manifold and remarkable claim was urged upon the Board (Rec., pp. 11–13); some of its items were proper and were approved by the Board. Their claims for the changes in the use of their property incidental to the viaduct plan, and which the Supreme Court describes as "speculative," were held by the Board, after full discussion, to be, as a matter of fact, to embrace incidental and not special damage. As the Board had already been held to be a *quasi* judicial body by the Supreme Court, the specious claim was made that the Board had declined to take jurisdiction of the questions, and mandamus was applied for to compel them to take jurisdiction. The Court below declined the motion for the writ, and the Supreme Court adjudged that the Commission had taken jurisdiction, that the question called for large wisdom and discretion, and that over the tribunal, wisely raised by the General Assembly for the protection of the lives of citizens, the Superior Court, another judicial tribunal, had no control, and that the judgment of the Commissioners

was wise and right. The case did not go out at all upon questions involved in the XIV Amendment, but upon the power of one Connecticut Court to control the judicial results of another. The hint at a Federal question made in the reasons for appeal is scarcely alluded to in the opinion of the Supreme Court, and not passed upon excepting to say that, if it had been argued, it would be difficult to present claims which had not often before been overruled.

The only ground of appeal (Rec., p. 21) which alluded to the Constitution, raised only a question of construing the laws, and did not attack them as unconstitutional, and the assignments of error in this action attack the judicial action of the Connecticut Supreme Court, and not the legislative action of the Connecticut Legislature. If by indirection the statute is attacked, then it is so attacked by a claim that it is offensive to the XIV Amendment for a lawful tribunal, in disposing of a nuisance, to comply with its defined statutory powers, in deciding what is a special expense for which they, in their wisdom, may allow compensation, and what is an incident to the improvement; and this writ of error asks the Supreme Court of the United States to review a judgment upon a question of fact passed upon by a governmental Commission in suppressing a nuisance, without any facts before this Court to consider, and with no information about the plans and changes, excepting as they may be guessed at from the vague and shadowy generalities of the application. In the case of Woodruff against these relators, 59 Conn., 73, the relators, in several of their fifty-two grounds of demurrer, urged that the Constitution of the United States, XIV Amendment, was offended by this act raising the Commission; upon that issue, the judgment of the Court was directly and in terms against them. At page 93 the Court says:

> "There is nothing in the legislative resolutions in violation of the Constitution of the United States."

If that judgment was offensive to the relators, they had their right to a writ of error to this Court. They took out a writ of error, which was dismissed at their motion (see 140 U. S., 691) and then, by agreement, submitted the questions of their claimed damages to the Commissioners (Rec., pp. 10–11). Being dissatisfied with parts of the judgment, and satisfied with other parts, they retained the benefits of the other parts, and asked another tribunal for a manda-

mus upon the Commissioners to compel them to change their opinion. Following a long line of precedents in Connecticut, the Supreme Court held that the judgment of the Commissioners could not be controlled by mandamus, and to that judgment, and not to a judgment on the constitutionality of the statute, the relators brought this writ of error. The law relates only to abating a nuisance, and the rejected claims only cover the use of the property of the nuisance makers. The laws were made as governmental acts under the police powers of the State and with no discriminations or offensive features. The award of damages, if damages there were, was given to a proper tribunal, and the tribunal has made its award. The award was not in full accordance with the wild claim of the relators. But they did not then resist the law, but sought by mandamus to control the discretion of the Commissioners by the intervention of another tribunal. The other tribunal declined to interfere, and the Supreme Court said they did right, and against the non-intervention of the other Court the plaintiff in error is fighting, and not against the statute itself creating the Commission.

The prayer of the motion is as follows (Rec., p. 15):

> "Said attorney therefore moves this Honorable Court to issue a writ of mandamus requiring said George M. Woodruff, William H. Hayward, William O. Seymour, Morgan G. Bulkeley, and Nathaniel Wheeler, acting as a Board of Commissioners under said act of April 14, 1884, and the acts supplemental thereto, and commonly known as the Asylum Street Bridge Commission, to inquire into the merits of each and every of said claims so disallowed by them, except claim A of item 15, and to order just damages to be allowed to the New York and New England Railroad Company, if any such damages be established by proof, as a part of the expense of said improvement, or otherwise, to be paid or apportioned agreeably to said act of April 4, 1884, and the several acts amendatory thereof; or to signify a cause to the contrary thereto to this Court, to be holden at New Haven, within and for the County of New Haven, on the first Tuesday of October, 1892.
>
> "Dated at New Haven, this 23d day of June, 1892.
>
> "TILTON E. DOOLITTLE,
>
> "*State's Attorney for New Haven County.*"

This prayer, which is the foundation of the proceeding, recognizes the validity of the law, and prays for action under it, and an attempt is here made by the relators to turn about and say that the law is unconstitutional.

BRIEF.

I.

THE JUDGMENT BELOW DID NOT AT ALL INVOLVE THE CONSTITUTIONALITY OF THE STATUTE.

1. The motion for a mandamus admits the validity of the acts in question.

> "Said attorney therefore moves this Honorable Court to issue a writ of mandamus requiring the Asylum Street Bridge Commission to inquire into the merits of each and every of said claims so disallowed by them, except claim 'A' of item 15, and to order just damages to be allowed to the New York & New England Railroad Company, if any such damage be established by proof, as a part of the expense of the improvement, or otherwise, to be paid and apportioned agreeably to said act of April 4, 1894, and the several acts amendatory thereof."
>
> Record, p. 15.

The motion is for mandamus to compel certain action under valid statutes; it is based on their validity.

If the clauses covering the duties of the commission as to damages and expenses are void, why ask for a mandate to compel action under them? These clauses are valid, or the motion which admits their validity is an absurdity, and the motion for a mandamus is the entire suit of the relators.

2. The judgment below was upon an appeal from a judgment of the Superior Court, declining to issue a mandamus to an independent tribunal — a tribunal whose duties involved the exercise of judgment and discretion.

> *State ex rel. N. Y. & N. E. R. R. Co.* vs. *Asylum Street Bridge Commission*, 63 Conn., 95. (Record, pp. 22–29.)

Such a judgment raises no federal question.

No alternative writ was ever issued. The case proceeded upon a mere motion for a rule to show cause why an alternative

writ should not issue. The Superior Court declined to issue the alternative writ, and the Court of Errors affirmed that judgment, because the action of the commission is not "subject to direction by mandamus."

State ex rel. N. Y. & N. E. R. R. Co. vs. *Asylum Street Bridge Commission*, 63 Conn., 95. (Rec., p. 24.)

This is simply saying that if any wrong has been inflicted upon the relators, mandamus to the Commission is not its proper remedy. A mistake in remedy is not protected by the XIV Amendment.

The writ of error is directed to the Connecticut Supreme Court for failing to review adversely the Superior Court's judgment upon an application for an alternative, not a peremptory, mandamus.

This is simply attacking an established practice of our Connecticut courts. The refusal by the Superior Court to issue an alternative mandamus has never been adversely reviewed in the jurisprudence of the State.

Questions relating to such practice are in no sense constitutional questions.

The law and practice of Connecticut in mandamus are clearly stated in

Seymour vs. *Ely*, 37 Conn., 106.
Goddard vs. *Town of Seymour*, 30 Conn., 395.
Freeman vs. *Selectmen of New Haven*, 34 Conn., 406.
State vs. *Staub*, 61 Conn., 567.
American Casualty Insurance Co. vs. *Fyler*, 60 Conn., 449.

"If the Court was of the opinion that the defendant's construction of the insurance statutes was an incorrect one it could not interfere by way of mandamus. That would be to substitute the judgment of the Court for the judgment of the officer appointed by law."

Idem, p. 462.

3. Neither the relator's 11th reason of appeal to the State Supreme Court nor the assignments of error here attack the statute itself, but attack the construction of it given by the Connecticut Court.

The 11th reason of appeal in the Court below is as follows (Record, p. 21):

> "11. Because if said several acts of the General Assembly are to be construed, as they were by the Superior Court, as denying any remedy by mandamus, or excluding any right of the relator to the damages *by it claimed*, as described in said application, or any of them, or to recover the same, or excluding the powers of said defendants to allow the same, then said acts are, so far forth, void as contrary to the constitution of Connecticut, and of the United States, and *to* the 14th amendment of said constitution, and the plaintiff's motion should therefore have been granted."

This is simply an argument against an anticipated misconstruction of the acts; it is not an assignment of errors. The Court is kindly cautioned against such a misconstruction, because certain unconstitutional results would follow.

The first assignment of errors in this Court sets out that the Court has given a certain interpretation to the statute, and that the statute, *as interpreted by the Court*, would deprive the corporation of its property without due process of law, and deprive it of the equal protection of the laws.

Record, p. 32.

The second assignment of errors is as follows:

> "Said Court erred in so interpreting said statute and amendments as in said first assignment of error set out." Rec., p. 32.

The third assignment alleges that:

> "The said Court erred in interpreting said acts as excluding any right of *the* said corporation to the damages by it claimed." Rec., p. 32.

The fourth assignment alleges:

> "That the said acts as interpreted by *said* Court, as in said *third* assignment of error set out, are in so far void," etc. Rec., p. 32.

Then the fifth assignment goes on to state:

> "That the said Court erred in deciding that by the terms of said act it was not the duty of said commission to consider the *said* several items of damage to the said corporation," etc.

The substance, therefore, of the assignment of errors is simply that the Court below misconstrued the Acts, and the errors which it is sought to have this Court review are all of them errors of interpretation. Such errors raise no federal question reviewable by this Court.

Adams vs. *Preston*, 22 How., 473.
Congdon Mining Co. vs. *Goodman*, 2 Black, 574.
Scott vs. *Jones*, 5 How., 343.
Smith vs. *Adsit*, 16 Wal., 185.
Klinger vs. *Missouri*, 13 Wal., 257.
Murray vs. *Gibson*, 15 How., 421.
Nichols vs. *Levy*, 5 Wal., 433.
Jackson vs. *Lamphire*, 3 Pet., 280.
Withers vs. *Buckley*, 20 How., 84.
Medberry vs. *Ohio*, 24 How., 413.
Porter vs. *Foley*, 24 How., 415.

This learned Court, as long ago as 1847, decided that it was not in its province to correct errors of interpretation made by the State judiciary.

In the case of the *Commercial Bank of Cincinnati* vs. *Buckingham's executors*, 5 How., 343, the Court says:

> "It is the peculiar province and privilege of the State courts to construe their own statutes; it is no part of the functions of this Court to review their decisions, or assume jurisdiction over them, on the pretence that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary."

To the same point is *McNulty* vs. *California*, 149 U. S., 647.

> "But grant that the decision of that Court could have this effect (impair the obligation of a contract) it would not make a case for the jurisdiction of this Court, whose aid can be invoked only where an Act, alleged to be repugnant to the Constitution of the United States, has been decided by the State Court

to be valid, and not where an act admitted to be valid has been misconstrued by the Court."

Commercial Bank vs. Buckingham Executors, 5 How., 342, and authorities there cited.

II.

IF THE JUDGMENT BELOW DID SUSTAIN AN UNCONSTITUTIONAL STATUTE, IT WOULD NOT BE SUBJECT TO REVISION FOR ERROR, IF IT DISPOSED OF THE SUIT BELOW UPON OTHER AND INDEPENDENT GROUNDS.

"Even if a Federal question was raised in the State Court, yet if the case was decided on grounds broad enough in themselves to sustain the judgment, without reference to the Federal question, this Court will not entertain jurisdiction."

Del. City Navigation Co. vs. *Reybold*, 142 U. S., 643.

The case turns upon a point not at all involving constitutional questions.

The Court states the questions to be :

"Ought the writ to issue? And was the judgment of the Superior Court denying it erroneous?"

"The first subordinate inquiry under this general one is, whether the action of the commission is subject to direction by mandamus. Manifestly a negative answer will dispose of the case."

State ex rel. N.Y. & N.E. R.R. Co. vs. *Asylum Street Bridge Commission*, 63 Conn., 95. (Rec., p. 24, fol. 40.)

The Court, in the course of its opinion, answers the question in the negative as one that

"Has been so often decided by this Court, and is so fundamental that, to follow the language of Judge Loomis in Batters *vs.* Dunning, 49 Conn., 480, it 'is too obvious to require the citation of any authorities.'"

Idem., 95, 96. (Record, p. 24, fol. 42.)

In this suit in addition to the main ground of the judgment, viz., that mandamus by one tribunal would not lie to another inde-

pendent tribunal, the Court alludes to several other infirmities in the proceeding (Record, p. 29, fol. 65), which were sufficient to defeat the appeal and which were urged in the argument by the defendent as:

1. That this was only an application for a writ of mandamus and that no form of either alternative or peremptory mandamus was before the Court.

2. That the tribunal was one to which the relators had submitted their claim (Record, pp. 10–11).

3. That the relators, having derived pecuniary and other benefits from the agreement of settlement, could not retain their benefits and complain of their disappointments.

4. That, as the parties could not be put *in statu quo* at the time of the agreement, the relators were estopped from quarreling with the capacity of the Court to whose judgment they had agreed to submit their claims.

5. That the capacity of the tribunal had once been litigated by the parties, and that the judgment of the Court in the case of *Woodruff* vs. *N. Y. & N. E.*, 59 Conn., 63, made the matter *res adjudicata*.

This latter point we desire to emphasize in the case at bar.

If these assignments of error raise any constitutional question, it is precisely the same question, namely, the invalidity of the statute under discussion which was decided adversely to these same relators, in the suit between the same parties fully reported in 59 Conn., 63.

From the judgment there made, the relators brought their writ of error to this Court, which was abandoned here, and dismissed per stipulation on this relator's motion, as set forth in 140 U. S., 691, as follows:

> "No. 1180. N. Y. & N. E. R. R. Co. v. Woodruff. Error to the Supreme Court of Errors of the State of Connecticut. December 19, 1890; dismissed, per stipulation on motion of Mr. Simeon E. Baldwin, for plaintiff in error.
>
> "Mr. Simeon E. Baldwin for plaintiff in error. Mr. Henry C. Robinson for defendants in error."

The Court will take judicial knowledge of the fact of this dismissal by agreement. This leaves the judgment in Connecticut a

finality, and the same parties cannot now come into this Court and raise the same point.

> "The judgment of a court of competent jurisdiction, dismissing a suit agreed, upon the ground that it has been agreed by the parties, is a final determination, as to those parties, of the matters litigated in that suit. It is virtually an acknowledgment by the plaintiff in open court, as in *retraxit*, that the plaintiff has no cause of action, or rather no further cause of action. It is not merely an abandonment of this suit by the plaintiff, as in non-suit; it is the concurrent action of both parties."

Black on Judgments, Vol. 2, Sec. 706, and authorities there cited.

III.

THE PLAINTIFFS IN ERROR ARE NOT ATTACKING THE CONSTITUTIONALITY OF THE LAW, BUT THE ADMINISTRATION OF IT BY ITS APPOINTED TRIBUNAL.

The grief of the relators is set out in paragraphs 27–32 of their application (Rec., pp. 13–15), and it is that the Commission allowed only a part of their claims, because the Commission was of opinion that the disallowed items were not elements of special but of incidental damage, and the opinion of the Supreme Court (Rec., p. 28, folios 57, 58) says:

> "And when it is the unquestioned and fully conceded power of the commission to determine in what proportion each party shall pay and bear the expense of the change and improvement, it would seem to be within a reasonable exercise of that power, according to its true intent and spirit, that, treating as a proper matter of expense, these items (not of actual outlay, or not as in the direct execution of the work, but of incidental loss, matters from their very nature incapable of precise, definite computation and ascertainment) should by the commission be apportioned between the parties by mutual offset, each bearing its own incidental loss as a due apportionment and adjustment of the entire burden, a way which, for aught we know, may be pre-eminently most fair and equitable."

N. Y. & N. E. R. R. Co. vs. *Woodruff*, 63 Conn., p. 101. Rec., p. 28, fol. 57, 58.

Item — by a mistake of printer or copyist the word "outlay" in this quotation reads in the record, p. 28, line 14, "author—y."

As to whether the Commission took jurisdiction of the question, the opinion says:

> "But, finally, as we have seen, it is contended that if the Commission possessed such discretion they failed to exercise it, the recorded action showing, as is claimed, that it disallowed the plaintiff's claims because of the want, as it judged, of jurisdiction or power to entertain them. We do not so construe the language used."
>
> Rec., p. 28, fol. 59.

Even if the Commission had committed the error complained of, it would be a mistake in administering the law. Such an error can neither be reached by this proceeding, as held in American Cas. Ins. Co. *vs.* Fyler, sup., nor does the allegation of it raise a Federal question, or attack the validity of the statute.

IV.

THE ACTS DO NOT OFFEND THE XIV AMENDMENT OF THE CONSTITUTION.

The Statutes are clearly within the police powers of the State — they have but a single purpose, to preserve the lives and health of the citizens of the State and of travelers passing through it. The right and duty of the Legislature to act through a commission and to make its judgments final cannot be disputed. That such acts, passed in good faith, are not open to the charge of offending the Constitution, can no longer be claimed to advantage in this Court. The law makes no discriminations. It affords ample protection to all parties. It gives to all a day in court. There is no taking of property in the whole transaction. The Commission regulated the use of the property of the three parties who were legally responsible for the nuisance whose abatement was the sole and important duty of the Commission.

To support these propositions by authorities would be superfluous if not impertinent in us, in view of the fact that the attention of the Court has so recently been called to them in the case of these relators and the town of Bristol, decided by this Court February 5, 1894. The construction of these very legislative acts by the Supreme Court of Connecticut, and of the State's grade crossing laws of a similar character, and the decisions of the United States Supreme Court upon the subject, were then fully presented to the Court, and the opinion of this Court in that case absolutely controls the point now submitted.

In *Woodruff* vs. *Catlin*, 54 Conn., 277, the first case in which the acts now before the Court were construed, the opinion, Pardee, *J.*, says:

> "The act, in scope and purpose, concerns protection of life. Neither in intent nor fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The legislature having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone or in part by both; and may enforce obedience to its judgment. That the legislature of this State has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue."

This language is quoted with approbation by the United States Supreme Court in the opinion in the Bristol case.

That opinion by the Chief Justice also says:

> "It must be admitted that the act of June 19, 1889, is directed to the extinction of grade crossings as a menace to public safety, and that it is, therefore, within the exercise of the police powers of the State. And, as before stated, the constitutionality of similar prior statutes as well as of that in question, tested by the provisions of the State and Federal Constitutions, has been repeatedly sustained by the courts of Connecticut. *Woodruff* vs. *Catlin*, 54 Conn., 277; *Westbrook's Appeal*, 57 Conn., 95; *N. Y. & N. E. R. R. Co.'s Appeal*, 58 Conn., 402; *Woodruff* vs. *Railroad Co.*, 59 Conn., 63; *State's Attorney* vs. *Branford*, 59 Conn., 402; *N. Y. & N. E. R. R Co.* vs. *Waterbury*, 60 Conn., 1; *Middletown* vs. *R. R. Co.*, 62 Conn., 492."
>
> "We are asked upon the grounds above indicated to adjudge that the highest tribunal of the State in which these proceedings were had, committed, in reaching these conclusions, errors so gross as to amount in law to a denial by the State of rights secured to the company by the Constitution of the United States, or that the statute itself is void by reason of infraction of the provisions of that instrument.
>
> "But this court cannot proceed upon general ideas of the requirements of natural justice apart from the provisions of the Constitution supposed to be involved, and in respect of them we

are of opinion that our interposition cannot be successfully invoked.

"As observed by Mr. Justice Miller in *Davidson* vs. *New Orleans*, 96 U. S., 97, 104, the Fourteenth Amendment cannot be availed of 'as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the State court of the justice of the decisions against him, and of the merits of the legislation on which such decision may be founded.' To use the language of Mr. Justice Field, in *Railway Co.* vs. *Humes*, 115 U. S., 512, 520:

"It is hardly necessary to say, that the hardship, impolicy, or injustice of State laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from State legislatures.

"The conclusions of this Court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that, therefore, they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the State has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a State, that, in such particulars, a law enacted in the exercise of the police power of the State is valid, will not be reversed by this Court on the ground of an infraction of the Constitution of the United States. *Railroad Co.* vs. *Alabama*, 128 U. S., 96; *Georgia R. & B. Co.* vs. *Smith*, 128 U. S., 174; *Railway Co.* vs. *Beckwith*, 129 U. S., 26; *Dent* vs. *West Virginia*, 129 U. S., 114; *Railroad Co.* vs. *Gibbes*, 142 U. S., 386; *Railroad Co.* vs. *Emmons*, 149 U. S., 364."

V.

THE ACT IS CLEARLY GOOD AS AMENDATORY OF THE RELATOR'S CHARTER.

The legislature had unlimited power to amend the charters of the city of Hartford and the two railroad companies.

This point was also fully argued in the Bristol case, and the opinion of the Court says, that

"A power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right." *Close* vs. *Glenwood Cemetery*, 107 U. S., 466, 476; *Waterworks* vs. *Schottler*, 110 U. S., 347; *Pennsylvania College Cases*, 13 Wall, 190; *Tomlinson* vs. *Jessup*, 15 Wall, 454.

"The charter of this company was subject to the legislative power over it of amendment, alteration, or repeal, specifically and under general law. Priv. Laws Conn., vol. V, pp. 543, 547; vol. VII, p. 466; vol. VII, p. 353; Spec. Laws Conn., 1881, p. 64; Stat. 1875, 278; Gen. Stat. 1888, sec. 1909; *Railroad Co.* vs. *Waterbury*, 60 Conn., 1."

"The Supreme Court of Connecticut held that the statute operated as an amendment to the charters of the railroad corporations affected by it; that as grade crossings are in the nature of nuisances, the legislature had a right to cause them to be abated, and to require either party to pay the whole or any portion of the expense; that the statute was not unconstitutional in authorizing the commissioners to determine their own jurisdiction, and that besides, the right of appeal saved the railroad companies from any harm from their findings; that it was the settled policy of the State to abolish grade crossings as rapidly as could be reasonably done; and that all general laws and police regulations affecting corporations were binding upon them without their assent."

VI.

THE LEGISLATIVE ACT IS CLEARLY WITHIN THE RESERVED POWERS OF THE CONNECTICUT GENERAL ASSEMBLY UPON WHOSE POWERS THE STATE CONSTITUTION IS ONLY A LIMITATION.

Wheeler's Appeal, 45 Conn., 306.

HENRY C. ROBINSON,

Counsel for Asylum Street Bridge Commissioners, Defendants in Error.

153-289

Supreme Court of the United States,

OCTOBER TERM, 1893.

No. 958.

THE STATE OF CONNECTICUT AT THE RELATION OF NEW YORK AND NEW ENGLAND RAILROAD COMPANY AND DAVID S. PLUME, *Plaintiff in Error,*

vs.

GEORGE M. WOODRUFF, *et als.*, COMMISSIONERS OF THE ASYLUM STREET BRIDGE COMMISSION.

In Error to the Supreme Court of Errors of the State of Connecticut.

Brief for Plaintiff in Error Opposing Motion to Dismiss or Affirm.

TILTON E. DOOLITTLE,
Counsel for Plaintiff in Error.

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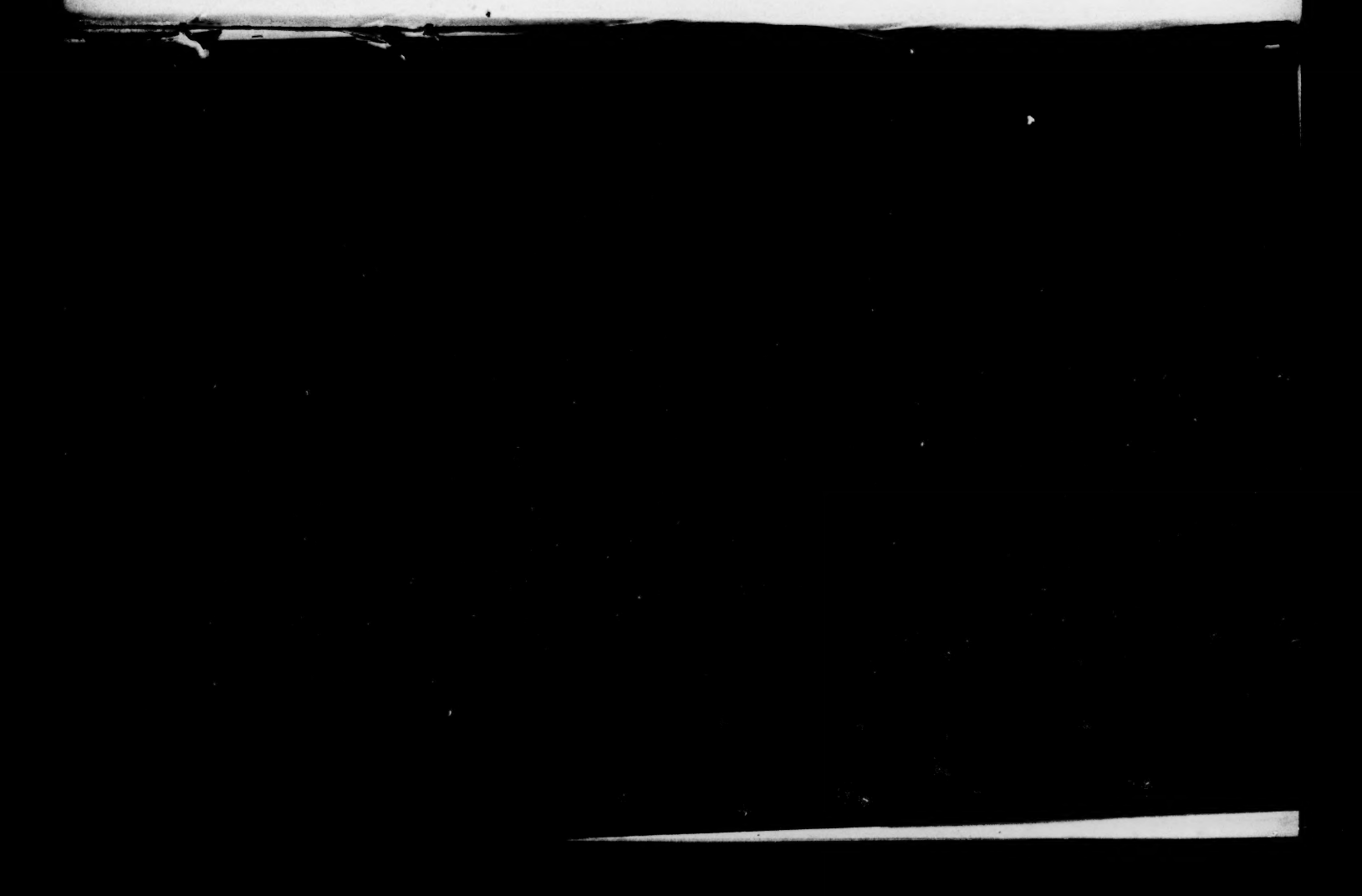

Supreme Court of the United States,

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STATE OF CONNECTICUT, *ex rel.* N. Y. & N. E. R. R. COMPANY, *et al.*,

vs.

GEORGE M. WOODRUFF, *et als.*, THE ASYLUM ST. BRIDGE COMMISSIONERS.

Error to the Supreme Court of Erorrs of the State of Connecticut.

BRIEF FOR PLAINTIFF IN ERROR.

Opposing Motion to Dismiss or Affirm.

STATEMENT.

Under the pleadings in this case it is to be considered as admitted that the New York and New England Railroad Company has been deprived of and damaged in its property to the amount of more than $350,000, without

receiving anything by way of compensation or damages. This is indeed the fact, and it is therefore not to be wondered at or condemned that the Company in endeavoring to save for its stockholders this great sum of money should insist in the courts of Connecticut that some tribunal should be opened to it before which it may assert its claim for compensation, and that upon being there told that no court has jurisdiction even to hear its claim, it should appeal to this court for aid to prevent the taking and destruction of property so great in value without due process of law.

The property of which the said Company has been deprived consisted of lands, of which it was the owner in fee, and its rails and railroad, depots, buildings and fixtures upon them in the city of Hartford. The tracks and roadbed of the New York, New Haven and Hartford R. R. Co. were adjacent to the lands of the plaintiff and the tracks of both companies together crossed the said Asylum and Church Streets at grade. Such use of the highways had been long continued and was entirely lawful, being expressly authorized by the charters of the companies and the laws of the State. The City of Hartford had control of and was responsible for the repair of the said two highways.

The General Assembly of the State of Connecticut in 1885, passed an Act (Special Laws of 1885, p. 80) directing the said two railroad companies and the City of Hartford to construct a bridge or other suitable structure with

proper approaches to carry Asylum Street over the tracks of the railroads or to carry the railroad tracks over the highway. In the event of the railroads and city not agreeing upon the manner in which the improvement should be made and paid for, a Commission was appointed and impowered and instructed to decide what damages should be made in the manner in which and the place where in the then line of said Asylum Street the tracks of said railroads crossed said street, in order to abolish the then grade crossing, and assure the safety of the public thereat, and to determine by whom and within what time said changes should be made.

The Act thus states the powers of the Commission:

> "SEC. 4. If said city and said railroad companies shall not, within said period of three months, agree as aforesaid, and submit their said agreement in writing to the railroad commissioners and obtain their approval thereto, then the railroad commissioners, Morgan G. Bulkeley and Henry C. Robinson, both of said city of Hartford, who are hereby constituted and appointed a board of commissioners for the State for said purpose, are empowered and instructed to decide what changes shall be made in the manner in which and the place where in the present line of said Asylum Street the tracks of said railroads cross said street, in order to abolish the present grade crossing and insure the safety of the public thereat, and to determine by whom and within what time said changes shall be made. Said commissioners are hereby authorized to order the carrying of said tracks and structure therefor over said Asylum Street and direct such a change in

the grade of said street in its present line and direction as they shall judge necessary and proper to the end aforesaid, and to order said railroad companies, or either of them, or the receiver or other person or persons operating either of said railroads, to lay out, construct and maintain a new line or lines of railroad for a distance not exceeding one-half a mile each side of said street, and within three hundred feet of the center line of the present tracks of said railroads, and may require any or all of the present tracks within said limits to be taken up and removed. Said commissioners are hereby authorized and empowered to order and direct a new highway to be laid out across said railroads and for such distance on either side thereof as they may direct, in place of or in addition to said Asylum Street. Said commissioners are empowered to make any and all orders relating to said improvement and to all matters and things appertaining thereto which they may deem necessary and proper in the same manner and to the same extent as this General Assembly might do and direct, and they may direct by whom, when and how the work shall be performed, and who shall pay for the same, and what proportion of the entire expense, including land damages, each party shall pay and bear, and they may, in the event of any disagreement between the parties, determine the cost of the whole or any portion of the work, and make any and all orders as to the manner and amounts of payments which they may judge reasonable; *provided, however*, that in no event shall said city of Hartford be required to pay any portion of the cost of any changes in the present depot or of the construction of any new depot, and not exceeding one-half of all the other expenses, including land damages, incurred under this resolution."

The railroads failed to agree with each other and with the City, and a plan was finally adopted by the Commissioners depriving the New York and New England R. R. Co. of so much of its property and involving it in so enormous an expense that its solvency even was threatened and it was compelled to resist the validity of the powers of the Commissioners. The orders of the Commission and the various litigations which ensued are set out in paragraphs 7 to 23, inclusive, of the application, Rec. p. 6–10. The opinion of the Supreme Court of Errors of the State of Connecticut in one of these cases is found in

Woodruff *vs.* N. Y. & N. E. R. R. Co.,
54 Conn., 63.

This was an application for a writ of mandamus by the Commission requiring the N. Y. & N. E. Railroad to obey an order of the Commissioners to remove its tracks from its land between Asylum and Church Streets. This is the order for complying with which the plaintiff's claim for compensation, 15 C. (Rec. p. 13) has accrued. The Company made the following claim in said case:

> "12. The defendant is a railroad corporation under the laws of this State, and has surface tracks running from a line a little north of Asylum Street continuously northward across what is called Church Street, (which defendant denies to be a street or highway), which tracks are owned and operated by the defendant as a part of its railroad, are within its location as legally established and

> within one hundred feet of the old center line of its location, are all laid upon land owned by the defendant in fee, are necessary for the enjoyment and profitable use by the defendant of said land, and cannot be taken up or removed, as commanded by said order or as prayed for by the plaintiffs, without doing damage to the defendant in the sum of two hundred thousand dollars." (59 Conn., 72.)

In regard to this claim the court said (59 Conn., p. 93):

> "The twelfth paragraph alleges only that the defendant would be subjected to great expense if the order of the commission should be carried out. The resolutions and the order being valid, and being required for the protection of life, the circumstance that its enforcement would subject the defendant to expense is not any reason against its legality. That is an argument to be addressed to the commission. So far as we have been able to examine we find no reason why the commission might not take any special damage to the defendant or to the City of Hartford or to the New York, New Haven and Hartford Railroad Company, into account as a part of the 'entire expense,' and determine what proportion each should bear, subject only to the limitation fixed in the resolutions."

Relying upon this as an adjudication of the power of the commission to consider the claims of this plaintiff for compensation and damage and unwilling to delay by litigation the bridging of Asylum Street if the just claims of the company could receive proper consideration, the Company entered into the agreement with the Commission and the City of Hartford, found on pages 10 and 11

of the Record. Paragraph 4 of this "Memorandum" is as follows:

> "4. Counsel for the bridge commission and for the city concede that it is competent for the Asylum Street bridge commission to award the New York and New England Railroad Company their actual damages for the removal of their tracks, as ordered by said commission, south of the north line of Church Street, as part of the expense of the improvement."

In consideration of this agreement the Writ of Error in this Supreme Court to the Supreme Court of Errors of the State of Connecticut

N. Y. & N. E. R. R. Co. *vs.* Woodruff,
140 U. S., 691,

was dismissed upon the stipulation of the parties, and the New York and New England Railroad Company presented its claim for compensation to the Commission. Item 3 is for land of the plaintiff taken and occupied exclusively as the site of a retaining wall, which wall was necessary to sustain the elevated roadway, which roadway was elevated to take the tracks over Asylum Street.

Item 4 is for the value of a building that was torn down because it stood directly in the path of this elevated roadway.

Claim C. of item 15 was for the direct injury to the plaintiff from the removal of the Church Street tracks by

depriving it of the beneficial use of the land south of Church Street.

Claim D. of item 15 is for a similar injury to its land north of Church Street.

Claims C., D. and E. of item 15 and items 3, 4, 5, 7, 8, 10, 11, 12, were disallowed by the Commissioners on the ground that the damages were not special to the New York and New England Railroad Company to be taken account of as a part of the entire expense of the improvement but such as were incidental to the carrying out of the design and instructions of the legislative acts creating and regulating the board and for public necessity. (Record pp. 13–14.)

The New York and New England R. R. Co. were thus on motion of opposing counsel and without hearing of evidence upon the merits of the claims, refused consideration of said claims and no other court was open to them. This application for mandamus was then brought against the commission seeking to compel them to consider said claims, and claiming that unless the law creating such commission required the consideration of the plaintiff's claims by the commission it deprived the company of its property without due process of law. The Supreme Court of Errors by a divided court held that there was no error in the judgment of the Superior Court refusing the writ.

BRIEF.

I.

The judgment below involved the constitutionality of the Act.

The act creating the commission has been three times considered by the Supreme Court of Errors of the State of Connecticut.

Woodruff *vs.* Catlin, 54 Conn., 277.
Woodruff *vs.* N. Y. & N. E. R. R. Co., 59 Conn., 63.
State *vs.* The Asylum St. Bridge Commissioners, 63 Conn., 91.

In these cases the reasons for the existence of the Commission, the power exercised through or by means of it, and, to some extent, the relations of the three corporations, over which it exercises power, to each other, have been judicially considered.

In the light of these decisions and with the opinion of this Court in the case of the N. Y. & N. E. R. R. Co., *vs.* Bristol, just published, we are not at liberty to question the right of the State in the exercise of its police powers to proceed by commission to secure a safe high-way at this crossing on Asylum Street.

We assume therefore that the powers exercised by the State through the commission in improving this crossing is the police power; that it is not contemplated that the *public* shall pay anything by way of compensation or damages to the three corporations, or any part of the expense of the improvement; and that the improvement to be made is a duty of the three corporations, and the expense of such improvement a debt which they must pay.

Now it is evident if the crossing was maintained by but one corporation, under the rulings of the court, that corporation must alone bear the expense and could look nowhere for compensation. The debt to be paid must be paid by it alone, because it alone owed the debt to the public.

But the crossing was maintained, not by one, but by three. The debt to be paid to the public is due from three and the question arises as between them what each has to pay or bear.

It must be apparent that the three corporations stand towards each other in quite a different relation from that in which together they stand towards the State. From the State they can demand no compensation for expense of any kind. In the exercise of its well ascertained power it has called upon them to do an act, and they must do it, and ask no pay.

But in doing the act commanded by the State each corporation exercises quite different powers; as between

each corporation and a stranger whose property has been taken or damaged compensation must be paid.

Each corporation is a stranger to the other. If the land of one is taken in the performance of the order of the State, the power exercised is for the three, for their benefit, against the one, and compensation should be paid by the three to the one whose land has been taken and the amount of such compensation should equal the whole value of the land taken or the damage done, less so much of that value or damage as such corporation should itself pay or bear.

In this case, by way of illustration, the three corporations have taken land of plaintiff, and built thereon, for the benefit of all, a retaining wall. (See claim 3.) Doubtless if this had been land of a stranger it must have been paid for. And doubtless, also, if it had been adjudged that the plaintiff must contribute the value of the land as its part of the debt due to the public it could receive no compensation. But if its debt to the public is less than the value of the land, should not the other two corporations pay to it the balance?

The New York and New England Railroad has claimed throughout this litigation that its property could not legally be devoted to the payment or satisfaction of the obligation of the New York and New Haven R. R. Company and the City of Hartford to the public, and that unless the act creating the commission provided a method for the ascertaining the obligation of each of the corpo-

rations responsible for the crossing, it permitted the property of one to be applied to the uses of another without compensation and without due process of law.

The plaintiff in error relying upon the opinion of the Court in Woodruff *vs.* New England R. R. Co., 59 Conn., 93, wherein it is said:

> "So far as we have been able to examine, we find no reason why the commission might not take any special damage to the defendant or to the New York, New Haven and Hartford Railroad Company into account as a part of the "*entire expense*," and determine what proportion each should bear, subject only to the limititation fixed in the resolution;"

and upon the agreement of the commission (Rec. p. 10, par. 24) were led to believe that the law had received such construction by the Court and the commission as to require the proper apportionment of damages between the three corporations. It therefore presented its claims in good faith to the Commissioners and urged this consideration. The Commisioners refused and the Court appealed to holds as follows: Rec. p. 22, 26.

1. That the words of the act which disclose that this commission may "direct by whom, when and how the work shall be performed and who shall pay for the same, and what proportion of the entire expense, including land damages, each party shall pay and bear, and that they may, in the event of any disagreement between the parties determine the cost of the whole or any portion

of the work," have reference only to the expense and cost of work ordered and directed done by the commission, and therefore the act strictly constructed does not require the Commissioners to apportion the damages or assess compensation for property of one devoted to the use of another, for the freight yard of the plaintiff, for instance, taken and devoted to the use of the New York, New Haven & Hartford R. R.

2. That is in any event it was entirely within the discretion of the Commissioners to consider the claims or not.

The laws therefore as constructed by the Court permits the taking of the plaintiff's property for the use of another and gives no right to any proceeding at law for compensation. The Court's decision is based upon this proposition, that the plaintiff's property may be devoted to the payment of the debt of the New York R. R. without compensation and without process of law.

This we claim is in opposition to that provision of the Constitution of the United States which provides that no State shall "deprive any person of —— —— property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II.

The case was not decided in the State Court on grounds broad enough to sustain the decision without reference to the Federal question.

1. It is the claim of the plaintiff that its property cannot be devoted to the use of another private corporation without compensation and due process of law. It is not an answer to hold that the Commissioners had jurisdiction to afford due process of law or not at its discretion and that it has not seen fit to act. This is to deny that the plaintiff has under the law a right capable of enforcement; to affirm a power to deprive it of its property and give the use of it to another without compensation.

2. It is not an answer to say that in exercising the police power the public need pay no compensation for property taken or injured and if compensation is provided for by statute that no compensation except such as the statute gives can be demanded; that in such cases "all such claims for damages and all claims that were not direct and immediate burdens have been uniformly holden too contingent and remote to be the basis of assessment for damages."

The claim here is for the taking of the property of one private corporation and devoting it to the use of another. It is not denied that in like cases between private corporations the damages such as are claimed are "the direct,

natural and unavoidable result of the taking" and can be collected. Such is the established law in Connecticut.

Bradley *vs.* New York & N. H. R. R., 21 Conn., 294.
Burritt *vs.* New Haven, 42 Conn., 174, 194.
Longworth *vs.* Meriden and Waterbury R. R., 61 Conn., 454.

3. The decision of the constitutional question is not evaded by acknowledging that the use by three corporations of the grade crossing is neither a nuisance nor a tort, and then applying to them the rule which allows no contribution between wrong doers.

No question is made in the pleadings in this case nor is it anywhere denied that the grade crossing at Asylum Street was authorized by law and its use by the corporations was in no way wrongful.

In the case of the town of Westbrook's appeal, 57 Conn., 104, the Connecticut Supreme Court in considering an act for the removal of grade crossing, says:

> "Its object is to change or remove certain conditions, lawful in themselves, but which have become a source of danger to life and property."

The same Court in N. Y. & N. E. R. R. Co's. appeal from Railroad Commissioners, 58 Conn., 539, says:

> "If the legislature should require the division of joint property between two persons equally inter-

> ested in such a manner as to give one three-fourths and the other but one-fourth it would be indefensible, being against natural right and not due process of law. So, too, if a statute that should attempt to compel one of two joint obligors, jointly and equally interested, to assume the whole obligation as between themselves."

In that case the question was of contribution between the Railroad Company and a municipal corporation, representing indeed the public and the State itself. In the present case we have the exact instance stated by the Court in the above quotation, to wit, "an attempt to compel one of two joint obligors jointly and equally interested to assume the whole obligation," and these obligors are private corporations. It being admitted that they have done no wrong how can the law relating to wrong doers be applied to them and the property of the one opposed to the use of the other without contribution or compensation unless "against natural right" and without "due process of law"?

The fact remains apparent that under due process of law the plaintiff could not have been deprived of its property without compensation.

III.

It is no objection to the remedy asked for in this suit that the law creating the commission is not void but is complained of only because it has been so applied as to violate a constitutional right.

The plaintiff has been deprived of his property under a law which upon its face afforded him a remedy. It has been so applied by the commission as to refuse him that remedy. For defense it points to the statute claiming that it permits it thus to do, and inasmuch as the statute has been thus interpreted by the commission and by the Supreme Court of Errors it is to be considered as in fact affording such possession. Yet how can this excuse protect since the law must be in such case invalid? The defense invoked is no defense, since the statute in so far is not law.

Poindexter *vs.* Greenhow, 114 U. S., 270.
Board of Legislation *vs.* McCowle, 92 U. S., 531–541.

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